JAMES H.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

No. 943

ELIZABETH CLEUGH, CLAIMANT OF THE STEAMER "BEACONSFIELD" AND WILLIAM LIBBEY, SURETY,

Appellants,

vs.

ALBERT W. SANBERN

Libelant-Appellee.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE "BEACONSFIELD" AND LIBBEY.

CONVERS & KIRLIN,

Proctors for Appellants.

J. PARKER KIRLIN,

Of Counsel

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Supreme Court of the United States.

ELIZABETH CLEUGH, Claimant of the Steamship "Beaconsfield," and WILLIAM LIBBEY, Surety, Appellants, vs. ALBERT W. SANBERN, Libelant-Appellee.	No. 943 of 1894.

Statement.

This cause comes before the Court upon a certificate from the United States Circuit Court of Appeals for the Second Circuit, setting forth the conclusions of fact reached by that Court upon an appeal from the Circuit Court, and requesting instruction upon certain stated questions of law, for the proper decision of the cause.

The salient facts set forth in the petition and annexed exhibits (to which reference is respectfully made) were as follows:

(1.) On December 21, 1886, a libel (subsequently amended) was filed in the District Court for the Southern District of New York, in the name of John Lucas Cotton, master, and George Cleugh, owner, of the steamship "Beaconsfield," as bailees of cargo on board their ship, to recover from the steamship "Britannia" the sum of $45,000, for damage to cargo, sustained in a collision between the "Britannia" and the "Beaconsfield," which occurred in New York Harbor, November 19, 1886.

There was no allegation that the libelants sued as agents or trustees. They sued in virtue of their special property in the cargo as bailees and carriers.

The fifth article of the said amended libel alleged:

"That the said collision was not caused by, nor owing to any negligence or default on the part of your libelants, nor of the master, officers and crew of the vessel," &c. (Cert., fol. 7).

(**2**.) On January 7, 1887, the Compagnie Française de Navigation à Vapeur, owner of the "Britannia," answered the said amended libel, denying responsibility for the damages, and alleging the collision was caused or contributed to by certain specified faults on the part of the "Beaconsfield," one of which was that she "did not keep on her speed as she should have done" (fol. 8).

(**3**.) On the same day the Compagnie Française filed an amended petition under Admiralty Rule 59, entitled in the suit of John Lucas Cotton and George Cleugh against the "Britannia," and cited the "Beaconsfield" into the cause as a party defendant upon the allegation that faults on her part had caused or contributed to the collision.

(**4**.) To obtain the "Beaconsfield's" release from process issued under the said petition John Lucas Cotton (one of the libelants), for George Cleugh (the other one), filed a claim (fols. 10, 94) as owner of the "Beaconsfield," and furnished an approved stipulation for value in the sum of $23,000, upon which, with another (since deceased), the appellant William Libbey was surety.

The undertaking of the surety was to pay the "decree of the said District Court, or of any appellate court to which the above named suit [*i. e.*, Cotton and Cleugh against the 'Britannia,' with the intervening petition] may proceed" (fol. 95).

(**5**.) Thereupon, and on February 7, 1887, George Cleugh, as owner and claimant of the "Beaconsfield," answered the amended petition of the Compagnie Française, denying the allegations of fault on the part of his vessel, and excepting to the jurisdiction of the Court to enforce any liability against her by reason of the proceedings taken by the petitioner.

(**6.**) On March 4, 1887, John Lucas Cotton and George Cleugh, as libelants, also answered the amended petition of the Compagnie Française, denying all fault on the part of the "Beaconsfield" contributing to the collision, and setting up substantially the same matters as pleaded in their amended libel against the "Britannia."

Their specific denials of fault on the part of the "Beaconsfield" were:

"They deny that there was any fault or negligence in the steamer 'Beaconsfield' contributing to or causing the said collision" (fols. 13, 124); "that the said collision was not caused by nor owing to any negligence or default on the part of your libelants, nor of the master, officers and crew of the 'Beaconsfield'" (fols 13, 132).

(**7.**) In the absence of any charge of fault against the "Beaconsfield," either in the libel or in libelants' answer to the petition, George Cleugh, as claimant of the "Beaconsfield," omitted to answer the libel or amended libel (an apparent requirement of the 59th rule).

(**8.**) The cause came on to be tried in the District Court, with the cross libels of the owners of the "Britannia" and the "Beaconsfield," against the said vessels respectively, for hull damages sustained in the collision.

Both vessels were found in fault, and the damages were divided.

(**9.**) Cross appeals were taken in this cause as well as in the cross suits of the owners of the respective vessels to the Circuit Court. Those appeals were taken in 1889, before the Circuit Courts of Appeals were established. Consequently, no assignment of errors was filed, but George Cleugh, in his appeal, stated that he appealed because the "Beaconsfield" had been found in fault and for "other reasons" fol. 155).

(**10.**) Pending the said appeals, and on October 3, 1890, George Cleugh, one of the libelants, and also claimant of the "Beaconsfield," having died, an order was entered in the Circuit Court continuing the libel originally filed in

the names of John Lucas Cotton and George Cleugh, in the name of John Lucas Cotton alone, and substituting Elizabeth Cleugh, administratrix of George Cleugh, deceased, as claimant of the "Beaconsfield" (fol. 16).

It does not appear that any notice of this application, nor of this order, was given to the surety.

(**11.**) The appeals in this cause to the Circuit Court came on to be heard with the cross appeals of the owners of the respective vessels for collision damages.

Although no consolidation order was entered, the three cases were heard together, and the findings and decision in the Circuit Court were entitled in all three.

The fourth conclusion of law was: "That those in charge of the 'Beaconsfield' were free from fault in the premises."

The final decree entered in the Circuit Court conformed to the findings and "adjudged and decreed that the said steamship 'Britannia' was solely at fault for the collision set forth in the pleadings herein" (fol. 175).

This decree was entered in the name of John Lucas Cotton, libelant, alone.

(**12.**) From this decree, the Compagnie Française appealed to the Supreme Court of the United States, October 8, 1890. The appeal went up upon findings of fact and conclusions of law, and upon exceptions under the Act of February 16, 1875.

(**13.**) John Lucas Cotton, libelant, did not appeal from the decree of the Circuit Court, although it absolved the "Beaconsfield" from all fault contributing to the collision.

(**14.**) The appeal of the Compagnie Française was heard in the Supreme Court at October Term, 1893, with its appeal from the decree dismissing its libel against the "Beaconsfield," for collision damage, and sustaining the "Beaconfield's" libel against the "Brittania" to recover for like damage (fol. 19).

(**15.**) The decision of the Supreme Court was entitled in all the cases, and in effect found both vessels at fault, and that the damages should be divided (The "Britannia," 153 U. S., 130).

(**16.**) The act of reversing the engines of the "Beaconsfield" until her headway was lost, and then stopping them, which the Supreme Court charged upon the "Beaconsfield" as a fault, was admitted in the amended libel of Cotton and Cleugh to have been the personal act of John Lucas Cotton, master of the "Beaconsfield" (fols. 47–48).

(**17.**) *It does not appear that the question was argued or considered by the Supreme Court whether John Lucas Cotton, master, and George Cleugh, owner, of the* "Beaconsfield," *jointly, or John Lucas Cotton, master, alone, as bailee, would be entitled to enter a decree against the* "Beaconsfield," *of which Cleugh was also claimant, for the whole or any part of cargo damages sustained through Cotton's personal fault.*

It does not appear that any exception was filed, appropriate to bring that question before the Court.

(**18.**) The mandate of the Supreme Court in this cause was filed in the Court below May 19, 1894.

It directed that:

"The decree of the Circuit Court in this cause be and the same is hereby reversed, with costs, in this Court, against Elizabeth Cleugh, executrix, only."

And further

"Ordered: That this cause be and the same is hereby remanded to the said Circuit Court, with directions to enter a decree in accordance with the opinion of this Court."

And that "further proceedings be had in said cause in conformity with the opinion and decree of this Court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

(**19.**) On the further proceedings so ordered, it appeared that Cleugh and Cotton had cabled to Mr. Black, then proctor for the "Beaconsfield," *and to Mr. Chubb, their own proctor*, as follows:

"You must not consent to any decree in our names, except against 'Britannia' for half damages. We only agreed to be libelants as bailees of cargo against 'Britannia'; we forbid our names being used for any decree against 'Beaconsfield' for loss of cargo. Please do needful to give effect to this. (Signed) Cleugh, Cotton" (fols. 23–25).

(**20.**) To meet this situation, a motion was made by Mr. Chubb to amend the libel by substituting the name of Albert W. Sanbern, the owner of the cargo, as party libelant, in the place and stead of John Lucas Cotton, master of the "Beaconsfield" as bailee, and for entry of the final decree in the name of said Sanbern; and notice of such motion was given to the claimant and to the surety, both of whom opposed it (fol. 26).

(**21.**) Notwithstanding the objections of the claimant and the surety, the motion to amend the libel, by substituting Sanbern in place of Cotton as libelant, was granted on June 7, 1894, and on the same day, against the objections of the claimant and the surety, a decree was entered in the name of Sanbern, condemning each of the vessels in a moiety of the said damages, amounting to $31,526.64 (Exhibit O, pp. 58, 59, 60, at fol. 237).

(**22.**) This decree directed William Libbey, surety, to show cause within four days why execution should not issue against him for the amount of his stipulation.

He showed cause on June 11, 1894, alleging exoneration from liability, under his stipulation, upon stated grounds.

"(1.) That the original and amended libels were filed by John Lucas Cotton, master, and George Cleugh, owner, of the 'Beaconsfield,' as bailees of cargo, and George Cleugh was claimant of the 'Beaconsfield.'

"(2.) That there was no allegation of fault on the part of the 'Beaconsfield' in the libel or amended libel or in the libelants' answer to the amended petition of the Compagnie Francaise.

"(3.) That the question of liability between the 'Beaconsfield' and the libelants was never actually litigated, there being no allegation in any part of the pleadings filed by libelants that the 'Beaconsfield' was in fault, and the bills of lading under which the goods were carried never having been interposed by way of defense.

"(4.) That at the time the sureties entered into their stipulation John Lucas Cotton and George Cleugh were parties libelant and continued to be such until after the final decree in the District Court.

"(5.) That the libel was subsequently and on October 3, 1890, amended by dropping the name of George Cleugh, who had died, and continuing the libel in the name of John Lucas Cotton alone, instead of in the names of said Cotton and Elizabeth Cleugh, as administratrix of the co-libelant, although she was substituted in George Cleugh's place as claimant.

"(6.) That after the mandate was handed down the libel was again amended by substituting the name of Albert W. Sanbern, owner of the cargo, in the place and stead of John Lucas Cotton, one of the bailees.

"(7.) They also referred to the proceedings previously had in this cause, including the proceedings in opposition to the entry of the final decree against the 'Beaconsfield,' and the application to substitute Sanbern in place of Cotton as libelant."

To the cause thus shown by the surety, the libelant filed no reply (fol. 33).

(**23**.) On June 12, 1894, against the said objections on the part of the surety, an order was entered directing judgment and execution against William Libbey, under

the stipulation, in the sum of $23,000, and judgment was entered against him for that amount on the same day (fol. 34).

Elizabeth Cleugh, claimant, and William Libbey, surety, having appealed separately from the final decree, and from the order for judgment and judgment, the cause came on to be heard in the Circuit Court of Appeals for the Second Circuit, which thereupon certified to this Court the following questions:

"**1**. Whether, in entering said final decree, condemning each vessel in a moiety of said damages, the Circuit Court obeyed the mandate of the Supreme Court.

"**2**. Whether, upon the above statement of facts, the libelant, Albert W. Sanbern, was entitled to a final decree condemning the steamship 'Beaconsfield,' her engines, tackle, apparel and furniture, in a moiety of the cargo damage, amounting to $31,526.64, as adjudged in the said final decree.

"**3**. Whether, upon the above statement of facts, the libelant, Albert W. Sanbern, was entitled to judgment against William Libbey, surety, in the sum of $23,000, as directed by the said order of June 12, 1894, and as adjudged in the said judgment entered pursuant to the said order, and filed June 12, 1894."

The appellants' contentions are:

(**1**.) That obedience to the mandate of the Supreme Court did not require the Circuit Judge to enter the decree which he did, because this Court did not have before it the question whether, apart from fault in the "Beaconsfield's" navigation, there might not be other defenses, which would prevent Cotton from obtaining any decree against the "Beaconsfield," and therefore presumably intended to give no directions as to that, nor did it have before it for review, the effect of Cotton's omission to appeal; because the further proceeding by which Sanbern was substituted for Cotton as libelant, was not a proceed-

ing settled by the terms of the mandate itself; and because the mandate left open the ascertainment of the quantum of damages and the amount (if any) due from the "Beaconsfield," and whether there was any limitation upon such recovery by reason of the terms of the stipulation for value as well as the form of the decree.

(2.) If the proceedings in the Circuit Court of Appeals be deemed to have been settled by the terms of the mandate, and appellant's remedy may have been mandamus or a rectification of the mandate, still the appeal of the surety gave the Circuit Court of Appeals jurisdiction, and as the cause now comes here on certificate, this Court, to avoid a multiplicity of applications, can now grant all needful relief.

U. S. v. *Jahn*, 155 U. S., 109.

(3.) The Court erred in entering a decree against the "Beaconsfield" in favor of Sanbern for $31,526.64, because there was no appeal by Cotton from the decree of the Circuit Court, which absolved the "Beaconsfield" from fault; admitting such fault, Cleugh, owner, and Cotton, master, as bailees, could not recover damages against Cleugh's ship for damages arising from Cotton's personal fault—a matter not considered by the Supreme Court—after withdrawal by Cotton and Cleugh of the use of their names in any decree against the "Beaconsfield," there never having been any charge of fault in the libel against the "Beaconsfield," the amendment of the libel by substituting Sanbern, owner of the cargo, and then entering a decree in his name against the "Beaconsfield," amounting to an entry of judgment in the name of a new party, without the joinder of issue, and without trial, *i. e.*, without due process of law.

(4.) The stipulation for value, upon which judgment was entered against William Libbey, surety, was void *ab initio*, since the obligor Cleugh, owner and claimant of the "Beaconsfield," and the obligee Cleugh, owner of the "Beaconsfield," libelant, as bailee, were the same persons, and the stipulation was in effect an obligation by Cleugh

to pay himself upon a liability which could only arise in case of his own fault or fault imputable to him.

(5.) If Libbey's stipulation ever had any validity, his obligation upon it was released by the amendments to the libel, first, continuing it in the name of John Lucas Cotton alone, after the death of George Cleugh, instead of in the name of Cotton and E. Cleugh, as administratrix, and, second, substituting Sanbern as owner of cargo, instead of the original libelants or one of them as bailee, after he had refused to be libelant against his own vessel (fols. 23–25).

POINTS.

I.

Obedience to the mandate did not require the Circuit Judge to enter a decree in favor of Albert W. Sanbern, condemning the "Beaconsfield" for a moiety of the cargo damage in the sum of $31,526.64.

The first question propounded by the Circuit Court of Appeals, namely:

"Whether in entering said decree, condemning each vessel in a moiety of said damages, the Circuit Court obeyed the mandate of the Supreme Court,"

is not perfectly clear. It is assumed, however, that the purpose of this question is to inquire whether the Circuit Court was *constrained* by the mandate to enter the decree which it did.

The mandate did not in terms direct the Circuit Court to enter any decree *in favor of Sanbern*, the new party libelant, nor did it in terms direct the Circuit Court to enter a decree against the "Beaconsfield" for half damages notwitstanding other defenses than that predicated on her alleged freedom from fault. It is assumed, therefore, that the real inquiry is, whether the mandate of this Court

constrained the judicial action of the Circuit Judge so that it was not open to him to consider *any* matter in opposition to the entry of the particular form of decree which he adopted, or in opposition to a decree in favor of the new party. If it did not, then the matters (apart from any question of fault) which were urged against the decree at Circuit are still open for review. How far then did the mandate go?

The material provisions of the mandate were:

"That this cause be and the same is hereby remanded to the said Circuit Court, with direction to enter a decree in accordance with the opinion of this Court,"

which was that both vessels were in fault, and that the damages should be divided; and

"that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding" (fols. 207–208).

In *Mason* v. *Pewabic Mining Co.*, 153 U. S., 361, the mandate of this Court directed an accounting of the proceeds of sale of the property of the Mining Company, and the cause having gone down, the Circuit Court rendered a decree conformably to the mandate ordering a reference, report and sale by public auction. Upon the coming in of the master's report, an application was made by the counsel for one of the parties for an allowance out of the amount realized on the sale, to which an answer was filed, and the petition having been denied, an appeal was brought to the Supreme Court. *Held*, that the appeal should have been taken to the Circuit Court of Appeals, as the particular proceeding involved was not settled by the terms of the mandate itself. Mr. Chief Justice FULLER, in delivering the opinion of the Court (p. 366) said:

"In *Texas and Pacific Ry.* v. *Anderson*, 149 U. S., 237, the action of the Circuit Court conformed to the mandate *and there were no proceedings subsequent thereto not settled by the terms of the mandate itself*, and we, therefore, held upon the authorities cited, and for the reasons given, that

on the facts appearing in the record, the Circuit Court of Appeals could not review, by writ of error, the judgment of the Circuit Court, but in this case the Circuit Court was at liberty to consider, as it did, the application for an allowance out of the funds on the footing of costs between solicitors and clients, and its action in that regard was open to review in the Circuit Court of Appeals."

These two cases lay down a working rule for ascertaining the cases which should be taken to the Circuit Court of Appeals for review of proceedings subsequent to the mandate, and those in which the error should be corrected by mandamus.

The counsel for the appellee contends that the proceedings in the Circuit Court in this case *were* settled by the terms of the mandate itself; that they conformed to it in all respects and were required by it; that, therefore, the Circuit Court of Appeals had no jurisdiction to review the judicial action of the Circuit Judge as to any matter, except the surety's claim of exoneration; and that, accordingly, the question whether there were other defenses wholly apart from her fault which would bar a decree for Sanbern against the "Beaconsfield," was concluded by the mandate.

On behalf of the appellants it is urged that certain matters were passed upon and considered by the Circuit Judge, as to which no direction was given in the mandate, nor involved in the conclusion of mutual fault reached by this Court upon the previous appeal. These may be considered in order:

1. *This Court did not have before it the question whether, notwithstanding the contributory fault of the* "Beaconsfield," *other defenses arising from the form and nature of the suit by the owner and master as bailees suing their own ship of which the owner was claimant might not bar a decree in favor of Cotton, or his successor, against the* "Beaconsfield" *and her surety, for half or any part of the cargo damages; nor was the question before it of the effect of Cotton's omission to appeal; and presumably, therefore, this Court did not intend by its mandate to conclude the action of the Circuit Judge as to such other possible defenses.*

This raises an inquiry as to what was brought to this Court for its consideration, upon the sole appeal of the "Britannia" from the former decree of the Circuit Court.

Conceding that Cotton, then libelant, filed no exception to the findings of the Circuit Court, and took no appeal to this Court from the decree which absolved the "Beaconsfield" from all liability to him, as bailee of cargo, the argument for the appellee proceeds to contend that the "Britannia's" appeal brought up the whole case, giving this Court jurisdiction to decide every matter involved, as well between Cotton and the "Beaconsfield," as between him and the "Britannia," so that, in effect, no appeal by Cotton was necessary; that everything in the case was open for consideration under the "Britannia's" appeal with the same force and effect as though Cotton had also appealed. This, we understand to be the logical effect of the appellee's contention.

Upon the libel of Cotton and Cleugh, as bailees, to recover the cargo damage from the "Britannia," the "Beaconsfield" having been cited in as co-defendant, the District Court found both vessels in fault, and divided the damages. Upon cross-appeals to the Circuit Court the Circuit Judge absolved the "Beaconsfield," upon the ground of her freedom from fault, and held the "Britannia" solely responsible, because of her faults in navigation.

Reaching the conclusion he did as to the "Beaconsfield's" freedom from fault, it was unnecessary for the Circuit Judge to consider any further ground of defense which the "Beaconsfield" might have urged in opposition to libelant's recovery against her.

The general appeal of the "Britannia" to this Court made two parties respondents to the appeal, namely, Cotton, libelant, who had recovered the full cargo damages from her, and Cleugh, claimant of the "Beaconsfield," who had recovered $129.40 costs from her on the dismissal of the petition, under which that steamship had been cited in (fol. 179).

In our view all that was brought up to the Supreme Court by the "Britannia's" appeal, was, (1) whether Cotton should recover the whole or any part of the cargo damage from her; (2) whether Cleugh should recover $129.40 costs from her.

The appeal of the "Britannia" alone did not bring up the question whether, if the Supreme Court found the "Britannia" free from all blame, the entire damages could be put upon the "Beaconsfield," or whether, if it found both vessels in fault, and adjudged the "Britannia" liable to pay only a moiety of the damages (there being no question of the ability of the libelant to recover the other moiety from the "Beaconsfield," if his rights as against her had been preserved by notice of appeal), it should impose the other moiety of the damages upon the "Beaconsfield." In order to bring either of those points before the Supreme Court, it would seem that the libelant, Cotton, must also have taken an appeal.

What, then, did the "Britannia's" appeal bring up?

Did it bring up *any* point as between Cotton and the "Beaconsfield," or only the "Britannia's" contention that, because of the "Beaconsfield's" fault in navigation, the "Britannia" should pay none or only a moiety of the damages? If that inquiry be answered in the affirmative, it would follow that the question whether other defenses distinct from the ship's fault in navigation would prevent Cotton or his successor from recovering the other moiety of the damages from the "Beaconsfield" or her stipulators must have been unaffected by the mandate sent down.

These points touch the basis of liability of two vessels proceeded against under the 59th Admiralty Rule for the recovery of cargo damage, and also the force and effect of an appeal to this Court in such a cause under the statute of February 16, 1875.

The argument for the appellee assumes that the purpose of the 59th Rule in such a case was only to adjust the equities as between the two vessels liable if libelant should

elect to proceed in the first instance against one of them alone. Is this view correct?

In the case of the *Milan*, Lush. Reports, 388, the facts were similar to those here involved. A libel was filed against vessel B by the owners of cargo laden on board vessel A. There being no proceeding at that time for citing in vessel A or her owners, the libel proceeded to judgment against vessel B alone. It was held that the plaintiffs should recover against vessel B only one-half of their damages.

DR. LUSHINGTON, in delivering judgment (p. 403) said:

"It is true, as I think, that the owner of the cargo is to be considered a perfectly innocent person, and that he does not stand in the same position as the owner of one of two delinquent ships, and if the sole ground upon which the admiralty rule rests is the joint culpability of the plaintiff and the defendant, it might well be that the owner of cargo should recover his whole damage against the adverse ship, but this is not exactly the view taken by admiralty law; it endeavors, whether wisely or not I do not say, to administer more equitable justice, and generally, where both ships are delinquent, it makes the owner of each bear a moiety of the loss, *and a moiety only*. I apprehend that carrying out this principle, the Court of Admiralty must say: 'You, the innocent owners of cargo, proceeding against one only of two delinquent ships, shall recover only half your damage, because we can affix to the vessel proceeded against only half the blame, and you shall be left with respect to the other half of your loss to your remedy against the owner of the other vessel, which we hold to be equally delinquent.'"

That case appears to assume that the owners of vessel "A," the carrier of the cargo, were able to and could be held to respond for the other half of the damage.

To what extent has that rule been modified by the decisions of this Court? It was urged as the proper principle in the case of *The Alabama and the Gamecock*, 92 U. S., 695, where the *form of decree to be entered in such a case* received the most careful attention of

the Court. Commenting upon it, the Court (at p. 696), said:

"And even so long as the ship having cargo is able to respond to half the loss, no difficulty arises; for the other ship is liable for the balance, so that the owner of the cargo injured will lose nothing. But, if the carrying ship *is unable to respond* to half the damage sustained by her cargo, the deficiency will be entirely lost if the other offending vessel can only be made liable for a single moiety. * * * And *if he cannot recover from either of them such party's due share*, he ought to be able to recover it from the other."

["Cannot recover," here means, cannot for some reason other than his own neglect.]

Proceeding then to lay down the true rule, and to prescribe the proper form of the decree, Mr. Justice BRADLEY (at p. 697) said:

"The safety of navigation requires that if they are both in fault, they should bear the damage equally, to make them more careful. And this consideration may well require, or at least justify, a *primary award against each of a moiety only* of the damage sustained by the cargo, for as between themselves that would be just. * * * A decree ought to be made against the 'Alabama' and the 'Gamecock,' and the respective stipulators, *severally, each for one moiety of the entire damage*, interest and costs, so far as the stipulated value of said vessel shall extend; and any balance of such moiety, over and above such stipulated value of either vessel, or which the libelant shall be unable to collect or enforce, shall be paid by the other vessel or her stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessel."

These principles were reaffirmed in The *Atlas*, 93 U. S., 302, where Mr. Justice CLIFFORD remarked that "much care was taken in framing the decree in that case."

The conclusion to be reached from an examination of those cases is that if both vessels be in point of fact at fault, they are severally liable to the cargo owner, libelant, for collision damage, and that if he joins both in his libel, or he libels one, and the other be cited in, and each

be of sufficient value to respond for a moiety of the damage, the libelant's claim as against each is to be limited in the first instance to a moiety of the damage only; and the decree should take that form, subject only to the provision for recovery over in case one may be unable to respond for some part of her half—an element which does not enter into the present case, since either vessel was good for the whole, so far as values were concerned.

The *Alabama and the Gamecock* is distinctly to that effect as applied to a case where the libelant originally joins both vessels. There would appear to be no difference between that and the case where he originally libels one and the other is cited in, since the 59th rule provides that if process, under the petition citing in the other vessel, be duly served, "*said suit shall proceed as if such vessel or party had been originally proceeded against*" [in the libel].

If it be correct that in such case libelant's recovery against each vessel (assuming the ability of each to respond for her moiety) is primarily limited to a moiety of the damage, it would seem to follow that if an appeal supervenes he must protect his rights by filing such exceptions and taking such appeal as will enable him to assert his rights as against either vessel if the decree as to one or both be varied by the higher Court.

The *Maria Martin*, 12 Wall., 31, 40.

What steps then should a libelant in such circumstances have taken in case of an appeal under the Act of February 16, 1875.

That act (Revised Statutes, 1 Supp., 62) required the Circuit Court in deciding admiralty and maritime causes to find the facts and the conclusions of law, and state the findings and conclusions separately, and further expressly provided that:

"The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, *shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court excepted to at the time as may be presented by a bill of exceptions prepared as in actions at law.*"

Since that statute was passed, appeals in admiralty are heard in the Supreme Court in all respects like appeals from a judgment entered upon a special verdict.

The *City of New York*, 147 U. S., 72.
In re Cooper, 143 U. S., 472.
Merchants Mutual Ins. Co. v. *Allen*, 121 U. S., 67, 72.
Sun Ins. Co. v. *Ocean Ins. Co.*, 107 U. S., 485.
The *Adriatic*, 107 U. S., 512.
The *Abbottsford*, 98 U. S., 440.
The *Louisville*, 154 U. S., 657.

The findings of fact and conclusions in the Circuit Court in this cause, to which reference is made by the certificate (fol. 17) and which appear in 42 Fed. Rep., 67, and 43 Fed. Rep., 96, contain nothing touching defenses, as between Cotton and the "Beaconsfield," distinct from the question of her fault in navigation; so that no exception, which might have been taken by the "Britannia" could possibly have brought such questions or any of them before this Court upon the former appeal.

An appeal from the Circuit Court, under the Act of 1875, did not vacate the decree below.

The *Belgenland*, 16 Fed. Rep., 430; 108 U. S., 153.

It would seem to follow from this that the decree and judgment of the Circuit Court remained as the final decision between Cotton and the "Beaconsfield," except so far as modified or reversed in regard to matters taken before the Supreme Court by appropriate exceptions and appeal.

As Cotton took no exception to the first decree of the Circuit Court, and did not appeal from it, anything there decided, as between him and the "Beaconsfield," must remain *res adjudicata*, unless the decree be opened by the decree of the "Britannia," and then only so far as her appeal did open it.

The former decisions of this Court have not expressly determined the extent of the jurisdiction conferred upon

it in such a case by the appeal of one vessel under the Act of 1875. For illustration, it may be useful to consider certain possible cases that might have been thus presented, and see how they have been or ought to be determined.

Suppose the damages had been divided in the Circuit Court, and the "Britannia" alone had appealed, and this Court had reached the conclusion that the "Britannia" was wholly in fault, would this Court have had jurisdiction to fix the whole damages upon her and absolve the "Beaconsfield" altogether. Apparently not, for on the "Britannia's" appeal the "Beaconsfield" would not have been heard to ask for any modification of the decree as to herself.

The *Des Moines*, 154 U. S., 584.
The *Cherokee Nation* v. *Blackfeather*, 155 U. S., 218, 221.
Groves v. *Sentell*, 153 U. S., 465, 476 (top).
The *Stephen Morgan*, 94 U. S., 599.
The *Quickstep*, 9 Wall., 665.
The *Maria Martin*, 12 Wall., 31.
Stratton v. *Jarvis*, 8 Peters, 4.
City of Antwerp, 37 Law Jour., Adm. 25.
The *J. & J. McCarthy* (C. C. A.), 61 Fed. Rep., 516.
The *William Bagaley*, 5 Wall., 377, 412.
Chittenden v. *Brewster*, 2 Wall., 191.

Suppose in such a case of divided damages at Circuit, this Court, on the "Britannia's" appeal, had reached the conclusion that the collision was an inevitable accident; could this Court, in the absence of an appeal from the "Beaconsfield," have released her from the award of half damages made by the Circuit Court? Apparently not, according to the cases last above cited.

If, in either of the cases put, this Court, on the "Britannia's appeal, could not release the "Beaconsfield" from the moiety of the damages imposed upon her by the Circuit Court, could it conversely *increase* the amount of such damages, without an appeal by libelant, from a moiety to the whole, in case the "Beaconsfield" was seen to have been solely in fault for the collision?

If it could not, in such a case, increase the damages assessed against the "Beaconsfield" from a moiety to the whole, on the "Britannia's" appeal without any appeal by libelant, then it would seem to follow that where she was found blameless at Circuit, the "Britannia's" appeal alone would not authorize this Court to put a half of the damages upon her. To warrant that result the decree would need to be opened as between libelant and the "Britannia," by an appeal on her part, and it would need to be opened as between libelant and the "Beaconsfield" by an appeal on his part.

If the appellee's contention be correct, it would follow that, on the "Britannia's" appeal, the Supreme Court might have imposed half damages upon the "Beaconsfield," on a finding of mutual fault, or the whole damages upon her on finding her solely in fault, and that, too, irrespective of any other defenses that might have been interposed as between her and the libelant. Yet, if the Court really had such jurisdiction, then it must be that, had the damages been divided in the Circuit Court, the "Britannia's" appeal would have given jurisdiction, either to impose the whole damages upon the "Beaconsfield" or to absolve her altogether; but to hold either of those propositions would be to overrule the decisions above quoted.

In the *Stephen Morgan*, *supra*, a libel was filed by the owner of the steamship "Carolina" against the schooner "Stephen Morgan" to recover damages sustained in a collision, and a decree was passed for divided damages. Both parties appealed to the Circuit Court, where the decree was affirmed. The claimant of the "Stephen Morgan," the defendant vessel, thereupon appealed to the Supreme Court of the United States. The libelant did not appeal. This Court refused to consider the question whether the "Carolina" was not free from fault. Mr. Justice CLIFFORD, in delivering the opinion of the Court, said:

"Parties who do not appeal from a final decree of a circuit court which is regular in form cannot be heard in opposition to the decree when the cause is removed here by the opposite party, unless it appears that the proceedings in removing the cause were unauthorized or

irregular. They may be heard in support of the decree, and in opposition to every assignment of error filed by the appellants. * * * Porting the helm a point when the light of a sailing vessel is first observed, and then waiting until a collision is imminent before doing any further, does not satisfy the requirements of the law.

"Other support to that conclusion might be invoked, but it is quite unnecessary, as the owner of the steamer did not appeal, and cannot be heard except in defense of the decree."

The *Quickstep*, *supra*, was also a case of divided damages, and went to the Supreme Court on appeal by the claimant. Mr. Justice DAVIS said, at p. 672:

"In our opinion the tug was clearly in fault, and the courts below, in dividing the damages, doubtless came to the conclusion that the men on board the "Citizen" were also to blame for deserting their boat sooner than good seamanship, under the circumstances, required. As the libelant did not appeal, and can therefore only be heard in support of the decree, we are not required to consider whether the evidence convicts the canal-boat of fault. The appellants have no right to complain, for in any aspect of the case they cannot escape without paying at least half the loss."

In *Cherokee Nation* vs. *Blackfeather*, 155 U. S., 218, the Court found that as far as the appellants were concerned, there was no error in the decree appealed from, and referring to an application made by the appellee for a modification of the decree, Mr. Justice BREWER, in delivering the opinion of the Court (at page 221) said:

"There is an application by the appellee for a modification of the decree increasing the sums awarded *per capita* to the Shawnees. It is enough to say in reference to this application that no appeal was taken by the appellee. Without an appeal a party will not be heard in an appellate court to question the correctness of the decree in the trial court (The *Stephen Morgan*, 94 U. S., 599)."

In The *Maria Martin*, 12 Wall., 31, the libelants were owners and freighters of the steam propeller, *Cleveland*, and they filed their libel against the barque *Maria Martin* to recover damages for the loss of the steamer and her

cargo in a collision between the barque and the steamer near the mouth of the Detroit River, whereby the steamer with all her cargo on board became a total loss.

In the District Court the libel was dismissed, but the Circuit Court entered a decree that each should pay a moiety of the damages and his own costs, and from that decree the claimants of the barque appealed to this Court. The libelants did not appeal.

Mr. Justice CLIFFORD, in delivering the opinion of the Court (p. 40) said:

"Both parties in a civil action may sue out a writ of error to a final judgment, but where one party only exercises the right, the other cannot assign error in the appellate court, and the same right to remove the cause from the subordinate to the appellate court for re-examination, is secured to both parties by the Act of Congress allowing appeals instead of writs of error, in cases of equity or of admiralty and maritime jurisdiction * * * Subject to the same rules and regulations as in case of writs of error, both parties may appeal in an equity, admiralty or prize suit from the final decree of the subordinate court, but the appeal, when entered in the appellate court, is also subject to the same restrictions as are prescribed in case of writs of error. Where each party appeals, each may assign error, but where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard, if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken. * * * Apply that rule to the present case, and it is clear that the appellees cannot be heard in opposition to the decree of the Circuit Court, as they did not appeal from that decree."

The appellant seeks to avoid the result of these cases by reference to the concluding words of the opinion of the Supreme Court upon the former appeal:

"The conclusion reached is the same as that arrived at in the District Court, and accordingly we reverse the three decisions and remand the causes to the Circuit Court, with directions to enter decrees in accordance with the opinion that both vessels were in fault, and the damages should be divided."

153 U. S., 130, 144.

This phraseology was necessary to cover the decrees to be entered in the cross-libels of the owners of the respective vessels for hull damages sustained in the collision. It does not necessarily imply that in the suit by the cargo owner a decree should be entered for half damages against the "Beaconsfield," irrespective of all defenses, as well those that were not heard in the Supreme Court as the single one that was; all it necessarily means, as applied to the cargo action, is that the decree should not be entered against the "Britannia" for the whole damages.

The cases of the *Umbria*, 11 U. S. Appeals, 612, and the *Galileo*, 29 Fed. Rep., 538, 539, do not aid the appellee, since, if sound in principle, they are distinguishable as decisions in Courts where appeals in admiralty causes are heard as new trials. An appeal to the Supreme Court, since the act of 1875, is not a new trial, but is, in effect, though not in name, a proceeding to review, in the nature of a writ of error (The *Maria Martin*, 12 Wall., 31, at p. 40).

In the *Galileo*, *supra*, at p. 539, Judge Wallace pointed out the difference between a writ of error and the appeal to the Circuit Court in an admiralty cause, which operates as a new trial, saying:

"The writ of error is a new suit in effect, and of course the only questions brought up for review are those arising between these parties only, because the party who is not joined in the writ of error, is no longer in the case. This is not so, however, in admiralty or in equity, where the appeal suspends the operation of the decree below and brings up the whole cause for a new hearing."

Those observations as applied to the Circuit Court or Court of Appeals, may be correct, but as the appeal to the Supreme Court, under the act of 1875, does not "bring up the whole cause for a new hearing," the reasoning of those cases is not here applicable (The *Louisville*, 154 U. S., 657; The *Maria Martin*, 12 Wall., 31).

It is worthy of notice, however, that the Circuit Court of Appeals, in The *J. & J. McCarthy*, 61 Fed. Rep., 516, failed to follow its decision in the *Umbria* (*supra*), to the full length, and declined on the appeal of one vessel, where both had been held in fault, to consider at all the question of fault or not on the part of the other.

It is submitted, with all respect, that the cases of The *Umbria* and the *Galileo*, are unsound in principle. Subject only to a single limitation which does not often arise, the right of a cargo owner proceeding against two vessels is limited to the recovery of a moiety from each (*The Alabama and The Gamecock*, 92 U. S., 695, 697). He can protect his rights by an appeal, as well as another party, and no good reason is perceived for any distinction between his case and the case of a division of damages where only one appeals, such as that of The *J. & J. McCarthy* (*supra*).

In the *Galileo* (*supra*) it is suggested that unless the court has jurisdiction, on an appeal by the *Galileo* from a decree exonerating the other vessel, to enter a decree for half damages against the vessel exonerated below, either the *Galileo* must alone pay the damages, though not alone in fault, or the owners must lose half their damages, because they did not appeal for the benefit of the *Galileo*. But if the owners are to lose half their damages because they did not appeal, then their appeal is not for the *Galileo's* benefit, but is prosecuted, like any other appeal, for the benefit of the party appellant, and it would not necessarily follow that, because the cargo owner did not appeal, the vessel which did appeal successfully must nevertheless bear the whole damages (see *ante*, pp. 14–20).

Though the Judge regards the proposition as an absurdity, is it not precisely what happens at common law where A and B are sued as joint tort feasors—say, in libel—and A appeals from a judgment against him, when B has been discharged. The rights of the plaintiff being several, he must appeal from the judgment discharging B, or lose all remedy if A succeeds on his appeal.

Downing v. *Coyne*, 121 Mass., 347.

The question is whether the claim of the "Britannia," on her appeal that she should pay only half the damages, is a right *against* the "Beaconsfield," so that an appeal by the "Britannia" is an appeal *against* the "Beaconsfield" which must enure to libelant's benefit. It is immaterial that this case arises under the 59th Rule. There cannot be one law for this case and another where the action was

brought against both vessels originally. The principle behind that rule is that the "Britannia," sued alone, has the right to compel the libelant to prosecute his case against the "Beaconsfield" also if she be within reach and of sufficient value, or take only half damages from the "Britannia." It is a right *against the libelant*, and can affect the "Beaconsfield" only through the libelant's rights against her. Justice to the "Britannia" requires no more; anything more would be unjust to the libelant and to the "Beaconsfield."

On the principles urged by the other side, the "Beaconsfield," if the "Britannia" had been found blameless, would have had to pay all the damages; yet that would not have helped the "Britannia." She was interested only to the point of exonerating herself. Whether the "Beaconsfield" shall pay half damages to the libelant is, both in form, upon the record, and in substance, a question that concerns those two parties alone, and on no sound principles of reason, justice or policy can the "Britannia" interfere of her own exclusive volition to drag the other parties into further litigation over that question and to overturn a decree as between them, in which both parties have acquiesced as a final settlement and determination of their rights as against each other. It was not for the "Britannia" but for the libelant to decide what were the chances of a successful appeal against the "Beaconsfield," and whether the chances were worth the trouble, delay and expense.

Undoubtedly the libelant could have waived his right to collect damages against the "Beaconsfield" or have compromised with her or, as he actually did (fols. 23–25), could have withdrawn his suit as to her at any time before decree. If so, the situation would be precisely what we claim it is.

There is no particular equity or inequity involved here other than the right of each party to have correct legal principles applied to the decision. On our contention it rested with the libelant, not with the "Britannia," to decide whether the decision of the Circuit Court should be accepted as a determination of his rights against her, and

his failure to appeal is a waiver of his right to object to the decision in that regard.

The conclusion is, that the appeal by the owners of the "Britannia," presented to the Supreme Court only (1) a controversy between themselves and the owners of the cargo, as to whether they should pay the whole or none, or a moiety of the damages; and (2) a controversy between themselves and the "Beaconsfield," as to whether they should pay $129.40 costs. That appeal, under the authorities above cited, did not involve or affect the rights or liabilities as between Cotton and the "Beaconsfield." Those liabilities were the subject of a distinct, separable and entirely independent controversy, upon which Cotton clearly might have appealed (The *Maria Martin*, 12 Wall, 31, 40). Having the right of appeal, he was bound to exercise it, if he desired to obtain any different ruling as between him and the "Beaconsfield" from that adopted in the final decree of the Circuit Court.

Against that position it is urged by the appellee that to hold Cotton concluded by the decree of the Circuit Court, because of his omission to appeal, would result in hardship to the "Britannia," since under the decision in The *Atlas*, 93 U. S., 302 it was alleged she would be liable for the whole amount, in case Cotton should not recover half from the "Beaconsfield."

But this result, it is submitted, would not necessarily follow. It could not follow in the present case, because the certificate shows that the decree has been satisfied as against the "Britannia" on payment of a moiety of the damages (fol. 35). If the argument based upon *The Alabama and The Gamecock* (*supra*), and the operation of the 59th Rule (Ante p. 15-17) be correct, it would not follow on principle; because Cotton's right to recover against the vessels being several, and being limited to a moiety of the damages as against each [subject only to the qualification of inability to pay the moiety, which does not here arise] if the "Britannia" took proper steps by appeal to obtain a reduction of the award against her from full to half damages, a court of justice would

not impose the other half on her also, solely because the libelant Cotton omitted to take an appeal, so as to entitle him to obtain the other half from the "Beaconsfield."

The loss of the other half would be imposed on Cotton, or he would be remitted to some other proceeding to obtain it from the "Beaconsfield," which, according to Lloyd's Register for 1895, is still a going ship owned by the same owner.

The effect of a failure of one party to appeal in equity cases leads to the same result.

Where the decree is several and one or more parties appeal, nothing is considered, except questions arising between those who do appeal and the appellee, and the rights of the parties to the record who do not appeal are concluded by the judgment of the Circuit Court. If the decree be joint, and some of the parties do not desire to appeal, those who do so desire, may have a severance, or some equivalent proceeding is taken, and then only the part of the decree so severed, goes up on appeal. If a party to a joint decree refuses to join in an appeal, after written notice and due service, the Court may grant an appeal to the other party as to his own interest.

In all these cases, it is only the interest of the appellants which is considered on the appeal.

Milner v. *Meak*, 95 U. S., 252.
Hardie v. *Wilson*, 146 U. S., 179.
Masterson v. *Herndon*, 10 Wall, 416.
O'Dowd v. *Russell*, 14 Wall., 402.
Downing v. *McCartney*, 9 Wall., 463.
Terry v. *Merchants' Bank*, 93 U. S., 38.
Kelsey v. *Western*, 2 N. Y., 500.
Idley v. *Bowen*, 11 Wendell, 227.
Groves v. *Sentell*, 153 U. S., 465.
Cherokee v. *Blackfeather*, 155 U. S., 218.

In *Kelsey* v. *Western* (*supra*), under a proceeding in equity to recover a legacy, the master to whom it had been referred to ascertain the facts reported $2,800 due. The defendant excepted to the report. A decree was entered overruling the exceptions, but dismissing the bill,

upon the ground that the testimony on the reference showed that the complainant had lost his right to sue for the legacy, as such, by taking a bond for its payment. The complainants appealed from that part of the decree which dismissed the bill; the defendant did not appeal. The decree was reversed and a new decree directed for the amount found due by the master. From the decree of reversal, the defendant appealed to the Court of Appeals, where it was held that the defendant, by failing to appeal from that part of the decree which was unfavorable to him, had forfeited his right to have it modified, and that it should be affirmed.

The Court (at p. 505), said:

"As to the residue of the decree, as neither appealed from it both parties admitted it to be correct. If the defendant felt himself aggrieved by that part of the decree from which the complainant did not appeal, he should have brought a cross-appeal. It is well settled that only that part of a decree which is appealed from is brought before the Appellate Court for review."

Other analogies bearing on the effect of the "Britannia's" appeal and Cotton's omission to appeal, are derivable from cases arising under the Act of February 16, 1875, Chap. 77, Sec. 3, which provided that no appeal could be taken to the Supreme Court unless the matter in dispute exceeded the sum or value of $5,000, exclusive of costs.

Under that statute it was uniformly held that where two parties, severally liable, were sued, and a judgment was rendered against them, from which a separate right of appeal existed in each defendant, the liability of one such defendant could be neither increased nor diminished by any action on the part of his co-defendant, and that the test of jurisdiction was the amount in dispute between the plaintiff and each of the defendants severally

In such cases, there were as many separate appeals as there were parties having separate interests, and the Court uniformly held that it was without jurisdiction, on appeal by one, to reverse or modify the decree appealed from so

as to affect the interests of another, between whom and the opposite party a separate right of appeal existed.

The test of the amount of the matter in dispute is the possible change in the decree which the Court has jurisdiction to make upon the appeal.

On an appeal by the claimant of vessel and cargo from a decree awarding salvage in an amount greater than the statutory requirement for appellate jurisdiction, and apportioning such salvage against vessel and cargo of various consignees in amounts less in each instance than the statutory requirement; *Held*, that even granting that the appeal might be considered as an appeal by all the owners of ship and cargo, it must be dismissed, since there is a separate matter in dispute between the salvors and the owners of each piece of property charged with its apportioned share of salvage.

Spear v. *Place*, 11 Howard, 522.

In a libel for salvage of merchandise, the libelant obtained a decree. The Circuit Court reduced the amount of the decree; libelant appealed to the Supreme Court.

Mr. Justice STORY (at p. 9): "From this decree an appeal was interposed in behalf of all the owners of the goods and merchandises to the Circuit Court; but *no appeal was interposed by the libelant. The consequence is that the decree of the District Court is conclusive upon him* as to the amount of salvage in his favor. He cannot, in the appellate court, claim anything beyond that amount, since he has not, by any appeal on his part, controverted its sufficiency."

Appeal dismissed because the amount awarded in the District Court against any one owner of the property salved did not equal $2,000.

Stratton v. *Jarvis*, 8 Peters, 4.

To similar effect—

Hunt v. *Bender*, 154 U. S., 556.

Keogh v. *Orient Fire Co.*, 154 U. S., 639.

On a motion for a writ of mandamus to compel the Judge of the Circuit Court to allow an appeal by the claimant of a steamship against which a decree had been entered on a libel for collision with a barge and cargo, awarding $1,400 to the owners of the barge, and $3,700 to the owners of the cargo, it was *held* that the Circuit Court had properly refused leave to appeal, because the award to each libelant was the subject of a separate controversy between himself and the steamship company in which the matter in dispute did not exceed $5,000.

Ex parte Balt. & Ohio R. R. Co., 106 U. S., 5.

A steamer collided with a canal boat, and damaged boat and cargo. On a joint libel the cargo owner was awarded more, and the boat owner less than $5,000, both awards being for full damages. The steamer appealed. *Held*, that as to the boat owner the appeal must be dismissed.

The *Nevada*, 106 U. S., 154, 155.

In *Gray* v. *Shufeldt*, 122 U. S., 27, where a motion was granted to dismiss an appeal by an assignee from a decree adjudging the assignment void as in fraud of creditors, and distributing the property assigned among the creditors who had joined as complainants, on the ground that as to those creditors who had not been awarded an amount equal to $5,000 the Court had no jurisdiction, Mr. Justice GRAY, in delivering the opinion of the Court, said: "Where a suit is brought by two or more plaintiffs, or against two or more defendants, or to recover or charge property owned or held by different persons (which more often happens under the flexible and comprehensive forms of proceeding in equity and admiralty, than under the stricter rules of the common law), the question what is the matter in dispute becomes more difficult. Generally speaking, however, it may be said * * * that when two persons are sued, or two parcels of property are sought to be recovered or charged, by one person in one suit, the test is whether the defendant's alleged liability to the plaintiff, or claim to the property, is joint or several; and that so far as affected by any such joinder, the right of appeal is mutual, because the matter in dispute between

the parties is that which is asserted on the one side and denied on the other."

A bill was filed by purchasers at a foreclosure sale against vendees of separate tracts from the mortgagor, who had not been joined in the foreclosure suit, and a decree was entered adjudging that the interest of each defendant should be deemed foreclosed unless redeemed within a certain time and at a certain rate.

Held, no defendant allowed to redeem at not over $5,000 could appeal.

Mr. Justice LAMAR: "It is clear that the appeal must be dismissed. The decree from which it is taken was not a joint decree, as is readily observed from a mere inspection of it. *The liability of each one of the defendants can be neither increased nor diminished by any action on the part of any of his co-defendants. The right of every one of the defendants to appeal from the decree is separate and distinct from that of the other defendants.*"

Wheeler v. *Cloyd*, 134 *United States*, 537.

It would appear to result from these cases that if the Circuit Court had awarded to the libelant $4,000 against the "Britannia," and $4,000 against the "Beaconsfield," neither the libelant nor the "Britannia" could have appealed, and this upon the ground that in an appeal by either, the question of liability of the appellant steamship would form a separate controversy in which the Court would have no jurisdiction to increase or diminish the liability of the other vessel.

The conclusion is that the mandate of this Court did not settle the terms of the proceedings had in the Circuit Court nor constrain the Circuit Judge to enter the decree which he did, so far as it related to the liability of the "Beaconsfield" to Cotton and Sanbern, for the reason that the "Britannia's" appeal did not bring any such question before this Court for review.

All that the mandate required, if the foregoing argument be well founded, was that the Circuit Court should adjudge (1) that Cotton should recover a moiety only of

the cargo damage from the "Beaconsfield," and (2) that Cleugh should not recover $129.40 from the "Britannia," as decreed at Circuit, but that the owners of that vessel should recover $126.50 against Cleugh, because the allegation of the petition that the "Beaconsfield" was in fault was sustained.

Further than that, the judicial action of the Circuit Judge was not constrained by the mandate. Whether he erred as to other matters must be considered in discussing the second question certified (*infra*, pp. 32–44).

2. *The further proceeding by which Sanbern, owner, was substituted for Cotton, bailee, as libelant, was not settled by the terms of the mandate, and the judicial action thus taken could be reviewed only by appeal to the Circuit Court of Appeals.*

Mason v. *Pewabic*, 153 U. S., 361.

3. *The mandate left open the ascertainment of the amount of the cargo damage and the quantum due from the* "Beaconsfield" *and her stipulators, also the form of the decree. The correction of any error as to these matters belonged to the Circuit Court of Appeals.*

The errors committed in this regard were:

(1.) Providing in the decree that the "Beaconsfield" be condemned, instead of limiting libelants' recovery (if any) to the stipulation for value, which became the substitute for the *res*, and released the vessel from the lien of the cause of action.

(2.) Providing for the condemnation of the vessel (if right at all) in the sum of $31,526.64, instead of in the amount of the stipulation for value, $23,000.

Obviously these were matters not settled by the terms of the mandate. The error in them is discussed *infra* (pp. 43–44).

II.

If all the foregoing matters should be declared to have been settled by the mandate, and appellants' remedy may have been mandamus or rectification of the mandate, still the surety's appeal gave the Circuit Court of Appeals jurisdiction, and as the cause now comes here on certificate, this Court, to avoid a multiplicity of applications, can now grant all needful relief by answering upon the merits the second question certified, which in effect includes the first, and covers the whole case, except as to the rights of the surety.

U. S. v. *Jahn*, 155 U. S., 109.
Mason v. *Pewabic*, 153 U. S., at p. 366.

III.

The second question certified, viz: "Whether upon the above statement of facts the libelant, Albert W. Sanbern, was entitled to a final decree condemning the "Beaconsfield," her engines, tackle apparel and furniture in a moiety of the cargo damage amounting to $31,526,64, as adjudged in the final decree," should be answered in the negative.

1.—Sanbern's right to recover damages from the "Beaconsfield," or her surety in this cause, was lost by the omission of his predecessor Cotton to appeal from the former decree of the Circuit Court, which reversed Cotton's decree against her in the District Court for half damages, and absolved her from all liability to him.

The *Des Moines*, 154 U. S., 584.
The *Cherokee Nation* v. *Blackfeather*, 155 U. S., 218, 221.
Groves v. *Sentell*, 153 U. S., 465, 476 (top).
The *Maria Martin*, 12 Wall., 31, 40.

The *Stephen Morgan*, 94 U. S., 599.
The *Quickstep*, 9 Wall., 665.
City of Antwerp, 37 Law Jour., Adm., 25.
The *J. & J. McCarthy* (*C. A.*), 61 Fed. Rep., 516.
Stratton v. *Jarvis*, 8 Peters, 4.
The *William Bagaley*, 5 Wall., 377, 412.
Chittenden v. *Brewster*, 2 Wall., 191.

Without attempting to state again the effect of these cases the appellants respectfully beg leave to refer to the argument based upon them in the preceding pages of this brief (*ante* 12–27).

The argument of the appellee (in addition to points there dealt with) contends that, as Cotton had recovered the whole damages against the "Britannia" at Circuit under the first decree, he was satisfied and saw no need to appeal. But that begs the question whether he had a right to rest on that result when the "Britannia" appealed, and the possibility of a variation of the decree as to her by this Court was presented to his mind. The appeal of the owners of the "Britannia," if the argument under Point I. be correct, gave him notice that in this Court they would require him to look to the "Beaconsfield" for a half or all the cargo damages, as was their right under Rule 59, and *The Alabama and The Gamecock*, 92 U. S., 695, 697. Having that notice, his failure to appeal was at his risk, not at the risk and expense of the "Beaconsfield." That failure left him, under the Act of 1875 and decisions of this Court, above cited, concluded as to the "Beaconsfield" by the decree of the Circuit Court.

2. *Neither Cleugh, owner, and Cotton, master, jointly as bailees, nor Cotton, master, alone, as bailee, could recover cargo damages from Cleugh's ship* ("Beaconsfield," Cleugh, claimant), *which arose from Cotton's personal fault.*

The specific finding of negligence on the part of the "Beaconsfield" in this Court was that she reversed her engines until her headway was stopped, and then lay still in

the water until the collision occurred (153 U. S., at pp. 141, 142, 143).

This, on the admission of the amended libel, was the personal fault of Cotton: "The master of the 'Beaconsfield' stopped and reversed his engines full speed astern until her headway was lost, when the engines were stopped. That immediately thereafter the 'Britannia' ran violently into the 'Beaconsfield'" &c. (Cert., fols. 47, 48).

After the "Beaconsfield" was cited in, the cause, under the provision of the 59th Rule proceeded in all respects as though she had been made a co-defendant in the original libel. The case must, therefore, be treated as though Cotton and Cleugh as bailees had proceeded originally in their libel against the "Beaconsfield" as a co-defendant, that vessel being owned by Cleugh, and he being her claimant.

On that state of the pleadings, would the libelants, as bailees, have been entitled to enter a judgment against their own ship for damages due to Cotton's personal fault?

In the libel it is alleged that the libelants are bailees of cargo, and they seek to recover the damages which bailees are entitled to recover. This right, and the basis and theory of it, have been clearly defined in this court in *Newell* v. *Norton*, 3 Wall., 257.

Mr. Justice GRIER, in delivering the opinion of the Court (p. 267), there said:

"It has been contended also that the right of the libelant to sustain this action ceased by his abandonment to the underwriters. The Circuit Court has very properly ruled that as the libelant was the owner and master of the 'Western World,' he was the bailee of the cargo, and so responsible to the shippers or insurers for the safe transportation and delivery thereof, *and to fulfill his obligations and secure his reward, he was entitled to possession and might maintain an action for its destruction.*"

The theory of the bailee's action, thus defined, is that the bailee recovers for damage done to his possession; *damage to his special property*, not to the owner's general property. He recovers, if at all, upon a right inherent in himself, and in no sense, at least before judgment, as an agent of the bailor.

After the damages are recovered, it may well be that the bailor could impose a trust upon them, and would be entitled to the proceeds, since he, by the bailee's recovery, would be barred from proceeding for the same damages against the same party, but that does not say that at any time before judgment the bailee, suing as such, proceeds, or must be deemed to proceed, as the agent or trustee of the bailor in such sense that the bailor has any control of the action or of the bailee's conduct of it up to the point of judgment. There would be no reason for holding to such a theory, since anything the bailee might do or omit to do in the action before judgment could not prejudice the rights of the bailor. Their rights up to the point of judgment are separate and distinct and rest on different bases. There would be no objection in law to independent and concurrent suits by both for the same loss, though, of course, satisfaction to one would end the suit of the other.

Viewing the case in this light, is not the action, upon the face of it, absurd? Cotton and Cleugh, seeking to recover damages to their possession of cargo on board the "Beaconsfield," of which Cleugh is owner and Cotton master, upon a cause of action arising from the personal fault of one of the libelants, which fault is imputable to the other one! Suppose Cotton had negligently or wilfully stranded the "Beaconsfield," and thus damaged the cargo, would the law permit him, as bailee, to recover the cargo damages from his own ship, and deny to his employer, Cleugh, the owner of the vessel, the right to interpose the defense that the damages had resulted from Cotton's personal fault? Suppose Cotton, in his capacity as master, had converted the cargo and sold it, would the law permit him, as bailee, to recover the value of the cargo from his own ship? Yet, as the right of action for the cargo damage against the "Britannia" and the "Beaconsfield" is several, those cases are no different in effect from an attempt in Cotton's name, as bailee only, to recover half the damages from the "Beaconsfield" herein. As that matter has never been before the Supreme Court, it is not too late to claim that, as against the "Beaconsfield," the alleged cause of action is

and always has been an absurdity, and that the Courts, so far as that branch of it is concerned, have not entertained a real question or controversy, but have proceeded in the enactment of a farce.

That would no doubt have appeared in this Court on the previous appeal if any claim had then been urged by the libelant against the "Beaconsfield" or if any exception or appeal had been taken appropriate to present it.

If this libel had been filed by Cleugh, owner, and Cotton, master, as bailees, or by either of them as bailees separately, against Cleugh, as owner of the "Beaconsfield," plainly it would not have been maintainable. It would then have fallen distinctly within the principle of *Simpson* v. *Thompson*, 3 App. Cas., 279. There, two ships, the property of the same owner, had been in collision; the underwriter spaid the insurance effected on the lost ship, and they claimed to rank *pari passu* with the owners of cargo destroyed, in the disposition of the fund lodged in Court by the owner as proprietor of the ship which did the damage. *Held*, that the underwriters had no such right under the circumstances of the case:

Per Lord *Cairns*, *L. C.*: The underwriters' right must be asserted in the name of the person injured, *but if he be the person who has caused the damage, the right cannot be maintained against himself.*

Per Lord Penzance: The underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, as he himself had no such right, inasmuch as being the owner of both vessels, any right of action he had must be *a right of action against himself, which is an absurdity, a thing unknown to the law.*

That case is distinguished by the appellee upon the ground that the insurer can stand in no better position than his assured, in proceedings against another vessel to recoup itself for damage insured against. True, it does decide that point, but it also decides the further point that the underwriter, suing in the owner's name, is subject to the same defenses as the owner would be, suing in his own name, and if the owner could not sue himself for the

loss, no action, in his name for another's use, can be maintained, even under the equitable principle of subrogation.

Is the case any different because the libel of the owner and master of the vessel against their own ship was *in rem?*

In the *City of Norwich*, 118 U. S., 468, 503, this Court, speaking through Mr. Justice BRADLEY upon that subject, said:

"To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, &c. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship, bound in bottomry, or subject to seizure for contraband cargo or illegal trade; and it may even be called 'the guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property. It is true, that in the *United States* v. *Mason*, 6 Bissel, 350, it was held that in a proceeding *in rem* for a forfeiture of goods, the owner might be compelled to testify, because the suit is not against him but against the goods. That decision, however, was disapproved by this Court in the case of *Boyd* v. *United States*, 116 U. S., 616, 637, in which it is said: 'Nor can we assent to the proposition that the proceeding (*in rem*) is not in effect a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property

which is sought to be forfeited. In the words of the great Judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' Vaughan, *C. J.*, in *Sheppard* v. *Gosnold, Vaughan*, 159, 172, approved by Ch. Baron Parker, in *Mitchell* v. *Torup*, Parker, 227, 236."

The conclusion, therefore, appears to be that Cotton and Cleugh, as bailees, or either of them, would not be permitted, under objection, to recover damages against their own ship arising from Cotton's personal fault.

The appellee contends there is no absurdity in the action because the money which the bailees recovered, if they did recover, would belong to the bailor, and upon this point he cites the case of *Hardman* vs. *Brett*, 37 Fed. Rep., 803, where the insurers, suing as assignees of the owner of the cargo, were held entitled to recover the proceeds which a carrier, as bailee, had recovered from another vessel whose negligence contributed to the loss. It is not necessary, for the purposes of this argument, to raise any question that *Hardman* vs. *Brett* was correctly decided. Undoubtedly, if Cotton and Clough had recovered the damages, the owner of the cargo, under some form of action, would be entitled to them; but that is quite a different proposition from that really asserted for the appellee, which is that the cargo owner also had the right to require Cotton and Cleugh to proceed *nolens volens* for the recovery of the cargo loss against their own ship practically with the same force and effect as though the bailor instead of the bailee had been the party plaintiff of record.

If our argument be correct, that the bailees at any time before judgment could compromise or abandon the cause as against the "Beaconsfield," or discontinue it as to her, without regard to the bailor's wishes, then it would appear necessarily to follow that one of them, as claimant, could interpose defenses against the other one or against himself and the other one jointly, which perhaps could not have been interposed as against the bailor, if a party.

Such a defense was interposed before the Circuit Judge upon the settlement of this decree. The absurdity of the action was pointed out to him, and Cotton and Cleugh's cables were exhibited to him, showing that they never intended to press, and withdrew all claim against the "Beaconsfield." Those objections were practically disregarded by the Circuit Judge by introducing the bailor as the party libelant in place of the bailee, and then without any issue being joined between the bailor and the "Beaconsfield," or without trial as between them, and without seeing the contract between the bailor and the ship, under which the cargo was carried, or having before him the terms of it, he proceeded, under objection, to enter a decree in the bailor's favor against the "Beaconsfield" for a moiety of the damages.

The appellee urges it was too late to adopt that course after the decision of this Court. But why? No notice of claim against the "Beaconsfield" was given after she was exonerated at Circuit. Until the case got back to Circuit again, when a claim was put forward against her there, not notified in the pleadings or proceedings, she surely had the right to meet it by every available objection. If it be said her objections were not in her pleadings, the answer is that libelant's claim against her was not in his pleadings. In point of fact the claim and the defenses were both passed upon by the Circuit Judge, and it was for error in his judicial action in sustaining the claim and overruling the defenses, as shown in the certificate, that the claimant prosecuted her appeal. That they were not considered on the previous appeal was due to the absence of any appeal appropriate to raise them.

The sound principle is that the bailee's suit must stand upon its own bottom, subject to possibly different defenses from those which could have been interposed in a suit by the bailor. Its application would work no injustice to the bailor, since it is open to him at any time to proceed regularly in his own name, to recover the damage to his general property in the goods. If he desires, he can obtain the right to use the bailee's

name *as agent*, and give notice by his pleading that the bailee is suing as agent for the bailor; then the suit would proceed substantially as though the bailor were a plaintiff on the record. But if the bailor desires to control the action which is taken by the bailee as such, there should be an averment of agency in the pleadings, so that fair notice is given to the other party that the suit is brought to recover for damages to the bailor's general property instead of the bailee's special property in order that his defenses may be shaped and stated accordingly.

The Anchoria, 9 Fed. Rep., 840.

In the present case it is apparent from the record that Cotton and Cleugh, or either of them, never assented to the use of their names for the assertion of any claim against the "Beaconsfield," as bailees, much less that they intended to allow their names to be used to recover, *as agents*, for the bailor. The express averment of the libel and of the libelant's answer to the petition was that the "Beaconsfield" was not in fault, and no notice of claim against her was ever given in either of the pleadings. Her owners were thereby naturally led to suppose that no claim was being or would be pressed against them in the names of the bailees. If the action had been in the name of the bailor, owner of the property, doubtless the contract under which the goods were carried would have been interposed as a defense, and it is impossible to know, without a trial between those parties, whether any provision of the bill of lading would have afforded an exoneration or partial exemption from responsibility, or a limitation as to the amount recoverable. Whether it would or would not, the "Beaconsfield" was certainly entitled to have that question tried, which, so far, has never actually been done.

The state of the pleadings and the course of the action, after hearing in the Circuit Court, were such as practically to give notice to the owners of the "Beaconsfield" that the cargo owner intended to look to the "Britannia" alone for a recoupment of his losses until, having lost the game, he presents a sudden change of front, demands that the "Beaconsfield" shall subscribe for half the loss,

and cries it is inequitable that she should question her liability to pay it.

3. *If Cotton, as bailee, after Cleugh was dropped as a party, could have recovered a moiety of the damages against the "Beaconsfield," arising from his own fault, he was not bound to do so, and did not intend to do so, and stopped the suit in his name before he actually did so.*

This appears in the certificate (fols. 22, 25). It is true that the evidence as to his action rests upon cables which were presented to the Court in affidavits, but they were accepted and considered by the Court as evidence, and their receipt and authenticity were not questioned by the proctor for the cargo, whose action in seeking to avoid their instructions, by substituting a new party, in place of Cotton, corroborates the argument that, up to that point, Cotton and Cleugh did not understand their names were being used for the enforcement of any liability against their own ship. The right of a bailee to arrest his action at any time before judgment is not questioned by the citation of decisive authority.

4. *After Cotton, by his cable, had stopped the suit, so far as concerned the "Beaconsfield," the substitution of Sanbern in his place as libelant virtually amounted to the institution of a new suit, and the entry of a decree in the name of Sanbern, without any joinder of issue as between him and the ship, and without trial, and was plain error.*

The *Detroit*, Brown's Adm., 141.
Tucker v. *White*, 5 Allen, 322.
Richards v. *Storer*, 114 Mass., 101.
Prince v. *Clark*, 127 Mass., 599.
Barns v. *Barrow*, 61 N. Y., 39.

Due process of law requires at least that the judgment shall conform to the charge contained in the pleading, and that it shall only follow after a trial upon the issues as joined.

In the present case there was no issue between Sanbern and the "Beaconsfield," no trial between them, no ascertain-

ment of the rights of the "Beaconsfield" under the bill of lading which had been issued to the libelant for the cargo. The only possible justification for the decree was that the "Beaconsfield" had incidentally and upon the appeal of another party been found to have been partly in fault for the collision. It did not necessarily follow from such a finding that she had to respond to the owner of the cargo for damages. Whether she had to or not depended upon the terms and condition of the bill of lading, and if she was liable under the bill of lading it would still be possible that the amount to be recovered may have been in some way limited or qualified.

To these suggestions the appellee answers, that they were not pleaded, which is true; but, on the other hand, no liability of the "Beaconsfield" was alleged in the libel, so that her claimant was not called upon to, and did not make any answer to the libel. If, without suitable allegations in the libel, Sanbern, coming in at the eleventh hour, could raise a claim upon a wholly different theory from that on which the action had to that moment proceeded, viz., damage to his general property as owner, instead of to the bailee's special property as carrier, clearly the defenses of the claimant ought to have been considered, even though they also may not have been pleaded. They were not considered, the Circuit Judge feeling bound, under the mandate, to enter the decree in Sanbern's name, in the form and manner which he adopted. In this, as already pointed out, the Circuit Judge was apparently in error.

5. *If the Circuit Judge was authorized to enter any decree in favor of Sanbern, yet it was error to provide in it for the condemnation of the Beaconsfield.*

The provision of the decree complained of, reads:

"The said steamship 'Beaconsfield,' her engines, tackle, apparel and furniture, be and they are hereby condemned * * * in a moiety of said sum, amounting to $31,526.34." (fol. 237).

The "Beaconsfield" had been released from custody

under the process of the District Court, upon filing a stipulation for value (fol. 10 and p. 23).

No objection appears ever to have been taken to this stipulation, either as to its sufficiency or amount. By its acceptance, it became a substitute for the *res*, discharged the lien and the cause of action against the vessel, and transferred the liability from the vessel to the stipulation.

Henry's Admiralty Jurisdiction, § 129.
The *Thales*, 3 Ben., 327; 10 Blatchf., 203.
The *White Squall*, 4 Blatchf., 103.
The *Union*, 4 Blatchf., 90.
The *Nahor*, 9 Fed. Rep,, 213.
The *Virgo*, 13 Blatchf., 255.
The *Edith*, 94 U. S., 518.

No question arises as to the stipulator's solvency, and in these circumstances the recovery of the libelant should be limited to the stipulation.

U. S. v. *Ames*, 99 U. S., 35.
The Steamer *Webb*, 14 Wall., 406.
The *Wanata*, 95 U. S., 600.
The *Ann Caroline*, 2 Wall., 538.

To insert a provision in the decree for the condemnation of the vessel in such case is in effect to give a judgment against the vessel, notwithstanding the substitution of the stipulation for value in her place, and might afford authority for a foreign court, in a suit upon the decree, to enforce some liability, either against the owner or the vessel, for the difference between the amount of the stipulation for value, $23,000, and the amount for which the decree condemns the "Beaconsfield," $31,526.34. That provision of the decree, it is submitted, therefore, was erroneous.

6. *If it were correct to condemn the "Beaconsfield" eo nomine, notwithstanding the stipulation for value, the condemnation should have been limited to the amount of the stipulation for value, because, in accepting the stipu-*

lation for that sum, the libelant consented that that amount must be the measure of the recovery.

U. S. v. *Ames*, 99 U. S., 35.

The Steamer *Webb*, 14 Wall, 406; and other cases above cited.

IV.

The third question certified, viz., "Whether upon the above statement of facts the libelant, Albert W. Sanbern, was entitled to judgment against William Libbey, surety in the sum of $23,000, as directed by the order of June 12, 1894 (p. 61), and as adjudged in the said judgment entered pursuant to the said order, and filed June 12, 1894 (p. 63)," should be answered in the negative.

1. *Libbey's stipulation for value never gave rise to any liability, on his part, since his principal in it, Cleugh, being both obligor and obligee, the stipulation extinguished itself.*

Cleugh, as bailee, was libelant against the "Britannia." That vessel cited in the "Beaconsfield," which thus became co-defendant. Then, by operation of the 59th Rule, Cleugh became libelant, as bailee against his own ship. Libbey's stipulation was given to release the "Beaconsfield" from the process citing her in. It was furnished at Cleugh's instance, and as under no form of decree could anything but costs (for which a separate stipulation was given) be payable by the "Beaconsfield" to the "Britannia," her codefendant, it must be that the undertaking of the stipulation was to pay the decree awarded to the libelant, *i. e.*, to Cleugh. Thus Cleugh as claimant gives a stipulation with Libbey as surety, to pay damages to Cleugh, libelant, as bailee; and the only ground on which a liability could arise under it would be some fault by his servants in navigating his

ship, which fault would be imputable to Cleugh. If he is found in fault he promises to pay himself the damages.

The situation is not changed by the joinder of Cotton with Cleugh as co-libelant. They both sue as bailees. Of course Cotton's possession is subordinate to Cleugh's. The grain was in Cleugh's ship; Cotton was Cleugh's servant. If the stipulation extinguished itself as to Cleugh, the principal, it was extinguished as to Cotton, his servant, the other joint bailor.

Cheetham v. *Ward*, 1 B. & P., 630.

The case was thus the ordinary one, where the obligor and obligee, the payer and payee, being the same person, the obligation extinguished itself.

Wankford v. *Wankford*, 1 Salkeld, 299.
Cheetham v. *Ward*, 1 B. & P., 630.
Gordon v. *Wansey*, 21 Cal., 77.
Harmer v. *Steele*, 4 Exch., 1.

In *Wankford* v. *Wankford* (*supra*), R. W. made a bond to S. S., who made R. W. his executor, and died. R. W. then died, before probate, but after he had partly administered, and the plaintiff, having been made administrator, c. t. a., sued the heir of R. W. on the bond. *Held*, the bond was extinguished.

HOLT, *Chief Justice* (p. 305), said:

"But notwithstanding these objections, I hold that the obligee's making the obligor his executor is a release in that case, and that for these reasons: 1st. Because by being made executor he is the person that is entitled to receive the money due upon the bond before probate; and as he is the person that is entitled to receive it, he is also the person that is to pay it, and *the same hand being to receive and pay, that amounts to an extinguishment.*"

Cheetham v. *Ward* (*supra*) was a case of debt on a joint and several bond by A and B to X. After the bond became due, X died and A, M and N became his executors, and were the plaintiffs. A plea was entered that by A's

becoming executor of X, the bond was extinguished as to both obligors. *Held*, on general demurrer, that the plea was good.

EYRE, *Chief Justice*, said:

"Where a personal action is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged."

Gordon v. *Wansey* (*supra*) was an action upon a promissory note in which the answer set up payment. A note had been made by H and three other defendants, and had been assigned without endorsement by the plaintiff to H, before maturity, and had been assigned by H to the plaintiff after maturity. *Held*, that the notes could not have been enforced by H, so that their being held by him amounted to payment, and that the defense of payment was consequently available against an assignee after maturity.

Harmer v. *Steele* (*supra*) was an action on a bill of exchange, accepted by the defendants. One of the defendants, H, let judgment go by default. The others pleaded that the bill was payable to the order of the drawer, endorsed and delivered by him to H, and endorsed and delivered by H to the plaintiff after it had become due and payable. *Held*, by the Court of Exchequer Chamber, on a special demurrer, that the fact that the bill passed through the hands of H was a discharge of the liability of the defendants.

WILDE, *Chief Justice*, in delivering the opinion of the Court, said:

"And it appears to us, on the authority of *Freakly* v. *Fox*, 9 B. & C., 130, and on principle, that the fact of the defendant Harmer, one of the acceptors, being at the time the bill became due the holder, and entitled to receive as well as liable to pay the amount of the bill, operated in respect of all the defendants as a performance of the contract to pay the bill at maturity, and put an end to the contract of acceptance."

If this point is sound, then obviously dropping out Cleugh and Cotton as libelants and putting in Sanbern, as against whom the Circuit Judge held such point invalid, plainly prejudiced and absolved the surety.

2. *If Libbey's stipulation was ever of any validity, his obligation upon it was released by the amendments to the libel, first, continuing it in the name of John Lucas Cotton alone, after the death of George Cleugh, instead of in the name of Cotton and E. Cleugh, as administratrix, and, second, substituting Sanbern as owner of cargo, instead of the original libelants, who sued as bailees, after the surviving bailee had refused to be libelant against his own vessel* (fols. 23–25).

The engagement of Libbey is contained in his stipulation filed January 10, 1887 (p. 23). That recites the filing of a petition by the Compagnie Francaise, claimants of the "Britannia," praying that process issue pursuant to Rule 59 in Admiralty, against the steamship "Beaconsfield," in the original suit of Cotton and Cleugh vs. the "Britannia," and that the vessel has been attached under process issued pursuant thereto, and that a claim has been filed in behalf of George Cleugh, owner of the "Beaconsfield," and agrees that in case of default or contumacy on the part of the claimant or his sureties, execution may issue against them; *conditioned*, however,

"That if the stipulator undersigned shall at any time upon the interlocutory or final order or decree of the said District Court or of any appellate court to which the *above named suit* may proceed, and upon notice, &c., *abide by and pay the money awarded by the final decree* rendered by the Court or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue."

The rights and the obligations of the appellant, Libbey, under this stipulation are to be determined by the law of principal and surety.

The *Ann Caroline*, 2 Wal., 538.
The *Webb*, 14 Wal., 406.
The *Wanata*, 95 U. S., 600.
The *Sidney*, 47 Fed. Rep., 260, 262.

The contract of the surety in admiralty, as in equity and law, is to be strictly construed; his liability is not to be extended by implication beyond the absolute terms of his undertaking.

In *Miller* v. *Stewart*, 9 Wheat., 680, 702, Mr. Justice STORY said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract; to the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. *It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it and a variation is made it is fatal.* And courts of equity as well as of law have been in the constant habit of scanning the contracts of sureties with considerable strictness."

Notwithstanding Section 941, R. S., which provides that judgment on a stipulation for value "against both the principal and sureties, may be recovered at the time of rendering a decree in the original cause," sureties are entitled to allege any defense appearing from the record, to a judgment against them, which was not before the Supreme Court, and any matter of discharge.

The *E. A. Packer*, 49 Fed. Rep., 92; 58 *Id.*, 251.

A surety on the stipulation for value may appeal from the decree against his principal.

The *Whisper*, 2 U. S. App., 445, 448.

If, therefore, it appears that either of the amendments changing the parties libelant has (1) introduced a party entitled to recover on the cause of action alleged, in place of one who could not have done so, or (2) has introduced one suing on a different cause of action from that alleged, or (3) has increased or altered the liability of the surety,

or deprived him of some right over against his principal for indemnity or prevented him from asserting some offset as to the libelant against his liability on the bond, which he otherwise might have alleged, it is plain he would be exonerated, and that the Court below erred in refusing so to hold.

The *Detroit*, Brown's Adm., 141.
Fullerton v. *Campbell*, 25 Penn. St., 345.
Brittain v. *Quiet*, 1 Jones Eq. (N. C.) 328.
Smith v. *Hayes*, 1 *Id.*, 321, 323.
Barns v. *Barrow*, 61 N. Y., 39.
Richards v. *Storer*, 114 Mass., 101.
Tucker v. *White*, 5 Allen, 322.
Prince v. *Clarke*, 127 Mass., 599.
University of Cambridge v. *Baldwin*, 5 M. & W., 580.
London Assurance v. *Bold*, 6 Ad. and El. (N. S.), 514.
Percival v. *McCoy*, 13 Fed. Rep., 379.

If by reason of the change of parties the rights of the surety *may* have been prejudiced, the burden of showing that they have not been is upon the creditor; it is not upon the sureties, to show that they have been prejudiced.

Miller v. *Stewart*, 9 Wheat., 680, 702.
Brandt, Suretyship, 370.
Allen v. *O'Donald*, 23 Fed. Rep., 573, 576.

(***a.***) The amendments continuing the suit in the name of Cotton alone, after Cleugh's death, instead of in the names of Cotton and E. Cleugh, administratrix, and substituting Sanbern for Cotton, deprived Libbey of a right of set off which he would have had as against the original libelants.

The entry of the order while the appeal in the Circuit Court was pending on October 3, 1890 (fol. 16), continuing the libel in the name of John Lucas Cotton alone, instead of in his name and that of Elizabeth Cleugh, as administratrix of George Cleugh, deceased, was prejudicial to the surety. George Cleugh's cause of action, if any, in such

case, survived to the administratrix, who should have been substituted in his stead.

Badlam v. *Tucker*, 1 Pickering, 389.
Towle v. *Lovet*, 6 Mass., 394.
1 *Perry on Trusts*, Sec. 343.

If Libbey's obligation must be determined as of the date when payment would come due under the final decree, the omission to continue the suit in the name of E. Cleugh as well as Cotton deprived him of the right to off-set Cleugh's debt to him for the amount he would be required to pay under the terms of his stipulation against the amount payable to Cleugh under the final decree.

This results from the absurd character of the suit. If Cotton and Cleugh could recover against Cleugh's steamer, Cleugh being claimant, for the damage set forth, and Cleugh, as claimant, defaulted in payment of the decree, Cotton and Cleugh, libelants, would then call upon the surety, Libbey, for the amount of the decree under his stipulation. What, then, would be the rights and obligations of the surety?

The surety would be entitled in the first place to go into equity and compel Cleugh, claimant, to discharge his debt to himself, as libelant, by offsetting one claim against the other.

Pride v. *Boyce*, Rice's Equity (S. C.), 275.

If Libbey did not adopt that course, but paid the decree, such payment of Cleugh's debt as claimant, would give rise immediately to a debt on the part of Cleugh to Libbey arising out of the stipulation; and the libelant Cleugh and the principal in the stipulation, Cleugh, being the same person, the surety Libbey could at once, in admiralty, as in equity, off-set the debt of Cleugh to him by reason of the stipulation as against his debt to Cleugh, libelant, under the decree.

Brittain v. *Quiet*, 1 Jones Eq. (N. C.), 328.
Smith vs. *Hayes*, 1 *Idem.*, 321.

In *Brittain* v. *Quiet* (*supra*), the plaintiff, who had been required to pay a sum of money for the defendant, under a

contract for suretyship for the defendant in another case, was granted an injunction restraining the defendant from attempting to collect from him under an execution a sum of money under a debt incurred and a judgment obtained subsequent to the time the plaintiff had paid the money in discharge of his contract of suretyship.

In *Smith* v. *Hayes* (*supra*), a creditor fraudulently removed his debtor from the State with the intent to hinder and delay the surety in the collection of such sum as he might have to pay for such debtor. The surety thereupon obtained an injunction in a court of equity, restraining the collection of the debt out of the surety.

PEARSON, *J.* (p. 323), said:

"Now, apart from the consideration that *equity seeks to avoid multiplicity of suits*, and that *to receive with one hand and pay back with the other is not only useless, but can be of no advantage to the one, and may put the other to inconvenience and probably subject him to loss*, we have here the equitable ingredient that the conduct of the creditor has not only given to the plaintiff a cross-action, but it amounts in equity to a discharge of the debt, so far as the surety is concerned, and gives him a right to demand the release or a perpetual injunction."

This offset against Cleugh would have been equally good against Cotton, his servant, as joint bailee and co-libelant (*Harmer* v. *Steele*, 4 Exch., 1; *Cheetham* v. *Ward*, 1 B. and P., 630); so that the further amendment leaving him out before decree and substituting Sanbern was also prejudicial in this regard.

The appellee's contention that a Court of Admiralty would not have permitted such an offset, because the damages, if recovered, would have belonged to the bailor, is ill founded. The bailor has no standing or voice in a bailee's suit until something has been recovered. Up to that point the bailee's suit is subject to all legal and equitable defenses. In such a case equity would aid and protect the surety rather than the bailor, since the latter might have sued in his own right and name and could do so even after the bailee's suit had failed.

(*b.*) The substitution of Sanbern in place of Cotton before decree introduced a party proceeding upon a different cause of action.

Libbey's stipulation was to abide by and pay the decree in the suit as it stood when he gave the bond. The then libelants, as bailees, if our view be correct (Ante, p. 35) were basing their libel upon a damage to their special property or possession as carriers. Sanbern's cause of action would be for damage to his general property as owner. That is a different cause of action, subject to different defenses. The substitution for one suit in place of another cannot but be prejudicial to a surety.

Fullerton v. *Campbell*, 25 Penn. St., 345.

(*c.*) The substitution of Sanbern in place of Cotton, after the latter had refused to have the suit go on in his name as bailee against the "Beaconsfield," introduced a party who, if he had originally been libelant, might have been entitled to recover, for one who not only was not so entitled, but had expressly abandoned and withdrew the suit, so far as it concerned that vessel (fols. 23–25). This was palpably prejudicial to Libbey as surety, and, being done against his objection, exonerated him from liability.

If our contention (*ante*, pp. 34–41) be correct that Cotton, as bailee, could discontinue the suit as to the "Beaconsfield" at any time before decree without the consent of the bailor then his instructions to his counsel and to the then counsel for the "Beaconsfield" withdrawing the use of his name in connection with the assertion of any claim against that vessel for cargo damage in effect amounted to an abatement of that branch of the cause. Libbey as surety was then and by that act virtually released from liability on his stipulation. Introducing Sanbern at that stage and posture of the case was substantially the institution of a new suit. If it revived his liability it prejudiced him; if it did not, the Court clearly erred in entering judgment against him.

The substitution by amendment of a libelant who may

be entitled to recover in place of one who is not so entitled, if not done with the surety's consent releases him from liability.

The *Detroit* (SWAYNE, Circuit Justice), Brown's Adm., 141.
Young v. *Lehmann*, Circuit Court, S. D. of N. Y., July 21, 1887, Wallace, Circuit Judge.
Fullerton v. *Campbell*, 25 Penn. St., 345.
Richards v. *Storer*, 114 Mass., 101.
Tucker v. *White*, 5 Allen, 322.
Prince v. *Clarke*, 127 Mass., 599.

In the *Detroit* a libel was originally filed in the name of *John K.* Harrow as owner of a vessel, but after the answer was filed and the testimony of one witness had been taken it was discovered that *James P.* Harrow was the owner, and an amendment was permitted by the Court, substituting James P. for John K. Harrow as libelant. SWAYNE, Circuit Justice, said:

"The libel in this case was originally filed by John K. Harrow, but by an amendment allowed under an order of the District Court the name of James P. was substituted. It was not a mere mistake in the name of the libelant, but *an actual change of one person for another. I think there was no authority to make this order.* It was decided by the Supreme Court in the *Commander-in-Chief*, 1 Wall., 43, that new parties may be added and parties improperly joined may on motion be stricken out, but I *do not think this authorizes the substitution of one sole libelant for another.* It is substantially the institution of a new suit. Clearly, this could not be done at common law, and I know of no authority for its practice in equity, except the one case cited from Bailey's Reports, which rests upon different principles."

In the headnote of the case, prepared by Mr. Justice Brown, it is stated:

"Such amendment is virtually the substitution of a new suit, and discharges the sureties upon the stipulation."

The libel in *Young* v. *Lehman*, was filed by the West Hartlepool Steam Navigation Co., to recover freight due under a charter-party upon an allegation that the libelant was a corporation and owner of the vessel chartered. The ownership was denied. After defendants had filed their stipulation for costs, the libel was amended by order of Court, substituting William J. Young, who proved to be the owner of the vessel, as party libelant. Upon appeal, Judge Wallace held that the sureties on defendants' stipulation for costs were discharged.

Fullerton v. *Campbell*, 25 *Penn. State*, 345, was a *scire facias* upon a recognizance of bail. Campbell brought an action for trespass *vi et armis* against James Milligan, and the case being referred under a compulsory arbitration law, an award was made in favor of the plaintiff. Defendant Milligan appealed from this award, and Fullerton became his bail on the appeal. A plea in abatement was filed, and at the trial the Court permitted the plaintiff to add the names of Philip Templeton and A. Colwell, as plaintiffs, and a verdict and judgment was rendered for the plaintiffs. This *scire facias* was sued out by Campbell, Templeton and Colwell, to recover from Fullerton the bail costs that accrued subsequent to the appeal. They recovered the sum of $53.05, whereupon Fullerton appealed to the Supreme Court. Chief Justice LEWIS, delivering the opinion of the Court, said:

"When Fullerton became the bail for Milligan's appeal, Hugh Campbell alone was the plaintiff. The result shows that he ought to have joined in the action the names of Philip Templeton and A. Colwell, and that the award in favor of Campbell alone was unjust or at least illegal. The omission to join the proper parties may have deprived the defendant of a fair hearing in questions of payments to the parties not named or set-offs against the real plaintiffs, and may also have deprived the defendant of the security to which he was entitled in case of a judgment in his favor. These considerations may have influenced Fullerton in becoming security for the appeal. He became bail on an appeal against the unjust claim of Hugh Campbell. His engagement is not to be extended to liabilities for his principal in a suit brought by Hugh Campbell, Philip Templeton and A. Colwell. The Court

had the power to permit the amendment if it appeared to them that a mistake or omission had been made. But the mistake in this case was that of the plaintiffs, and they have no right to visit the consequences of it upon the bail, who, for all that appears, never would have become bound as bail on appeal, if the recovery before the arbitrators had been in favor of the proper parties."

In the *Commander-in-Chief*, 1 Wall., 43, the authority on which the Circuit Judge granted the amendment, Mr. Justice CLIFFORD said (although the point was not held):

"Where the suit is commenced by the owners of the injured vessel, it is undoubtedly competent for the owners of the cargo *to petition to intervene* for the protection of their interest at any time before the fund is actually distributed and paid out of the Registry of the Court." * * *

Undoubtedly amendments in the pleadings are generally within the discretion of the Court, and the ordinary and usual amendments are generally held not to affect the obligation of a surety under his stipulation. But as pointed out by Mr. Justice *Swayne* in the *Detroit*, Brown's Adm., p. 141, the exercise of such discretion by the Court has legal limitation; and one of those limitations is that an amendment must not be made without the surety's consent, which in effect introduces a party entitled to recover in the place of one who is not entitled to recover, or who has elected not to proceed with the action.

The *Commander-in-Chief* is not authority for the amendment of the libel by substituting one party in the place and stead of another. All that case actually intimated is that where the libel is for damage to cargo suffered in a collision, and is brought by the shipowner as bailee, it is competent for the Court to entertain a petition by the real owner of the cargo to intervene, and require the cargo damages, *if recovered by the bailee*, to be paid over to him before distribution of the proceeds out of the Registry. It will be seen that that is quite a different case from the present, and has no real bearing on the point made by the surety, which was, not that Sanbern might not intervene as a co-libelant, or independently, and take the moneys, if

any were recovered in the pending action, but *that he should not be substituted as sole libelant, in order to recover in his own name and right, damages which the preceding libelant was legally barred from recovering, if he had wished to, and who really did not wish to recover them and had in effect withdrawn his claim against the* "Beaconsfield" *before the entry of any final decree, and before the amendment was applied for.*

The conclusion is that the Circuit Court erred in awarding the judgment complained of against William Libbey, surety, and that the third question ought to be answered in the negative.

NEW YORK, April 18, 1895.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Appellants.

J. PARKER KIRLIN,
Advocate.

Office Supreme Court, U. S.
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APR 22 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894,
No. 943.

ELIZABETH CLEUGH, CLAIMANT, &C., AND WILLIAM LIBBEY, SURETY,
Appellants,

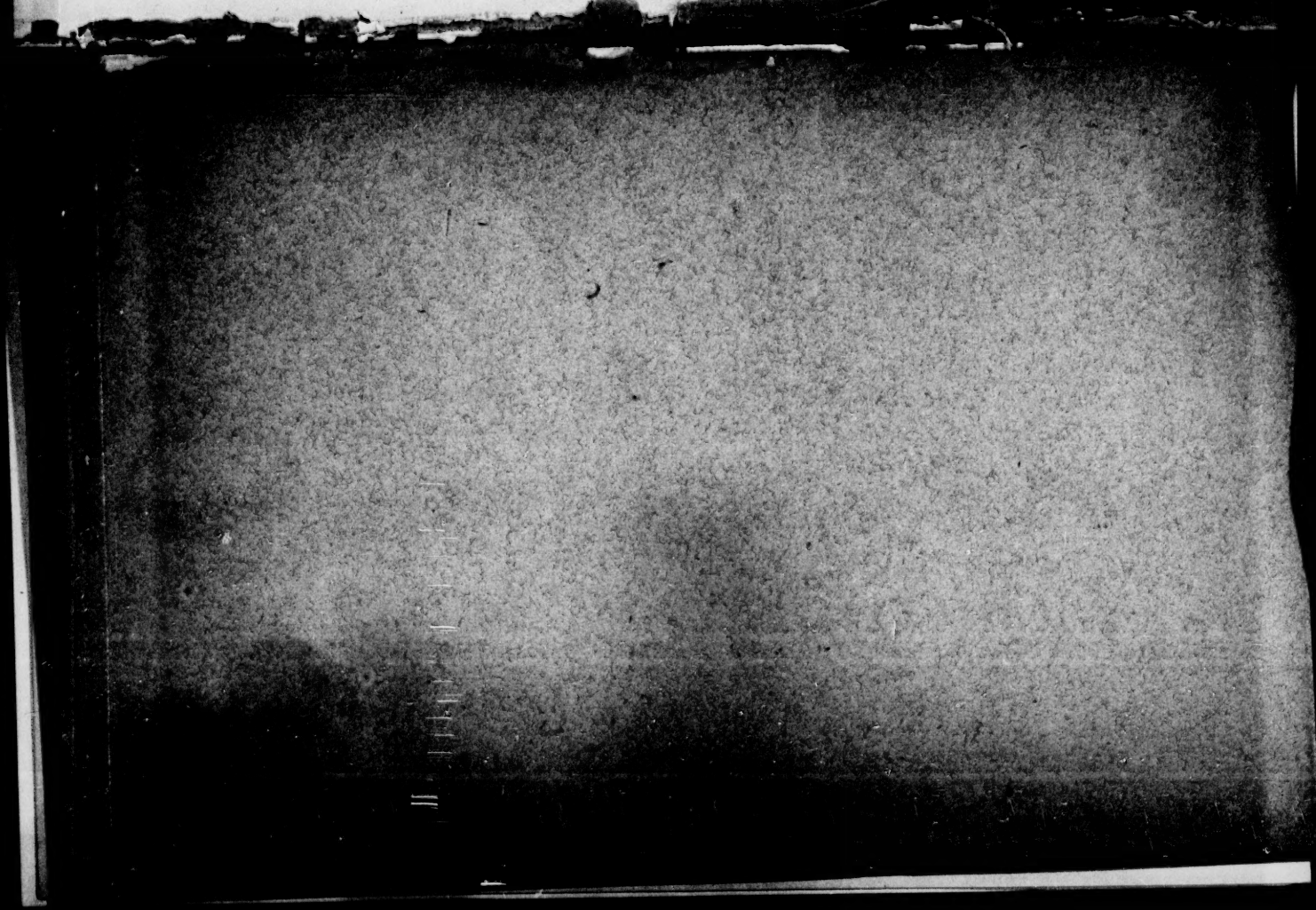
vs.

ALBERT W. SANBERN,
Libellant-Appellee.

BRIEF FOR APPELLEE.

SIDNEY CHUBB,
Proctor for Appellee.

WILLIAM G. CHOATE,
Advocate.



Supreme Court of the United States.

ELIZABETH CLEUGH, Claimant of the Steamship "Beaconsfield," and WILLIAM LIBBEY, Surety,
Appellants,

vs.

ALBERT W. SANBERN,
Libellant, Appellee.

BRIEF FOR APPELLEE.

Statement.

Three suits were pending in the District Court of the United States for the Southern District of New York sitting in Admiralty.

Cleugh, the owner of the steamship *Beaconsfield, vs.* the steamship *Britannia;* La Campagnie Francise de Navigation a Vapeur, Cyprien Fabre et Compagnie, owner of the *Britannia vs.* Steamship *Beaconsfield*, and Cotton, master of the *Beaconsfield* and Cleugh, her owner, suing as bailees of the cargo of the *Beaconsfield, vs.* the *Britannia.*

Under the 59th Rule in Admiralty, the *Britannia* being sued for the whole amount of the damage to

the cargo, cited in the *Beaconsfield*, in the third suit, alleging that the damage was caused by the fault of the *Beaconsfield*.

The first two suits were cross-libels between the *Beaconsfield* and the *Britannia*, each charging the other with the fault of the collision, and claiming damages to the vessels respectively. The *Beaconsfield* having been brought in, Cleugh appeared as claimant and united with Libbey as surety in stipulation for value.

The causes proceeded to trial together and resulted in a decision that both vessels were in fault and dividing the damages, in the District Court (reported 34 Fed. Rep., 546). Decrees were entered accordingly, including a decree in favor of Cotton, libellant, awarding the libellants, Cotton and Cleugh, $42,748.63 damages, with interest, and providing that both vessels be condemned in a moiety of said amount (Record, p. 35).

The owners of both vessels appealed to the Circuit Court, each claiming error in the decree, in that his vessel was found in fault and that the other was not found in fault (Record, pp. 37 and 40).

The Circuit Court found the *Britannia* alone in fault and reversed the decrees below, and entered a decree against the *Britannia* for the whole amount of damage to cargo (Record, p. 43). The owner of the *Britannia* took an appeal to the Supreme Court (Record, p. 48). And appeals having been likewise taken by the owner of the *Britannia* in the other cases where like decrees had been entered charging the *Britannia* alone for the collision, the three appeals were heard together in the Supreme Court in April, 1894, and decided on the 23d April, 1894, the opinion being delivered by Mr. Justice Shiras (153 U. S., 130, 133), the conclusion of the opinion being as follows, page 144:

"The conclusion reached is the same as that
" arrived at in the District Court, and accordingly we
" reverse the three decrees and remand the cause to

" the Circuit Court, with directions to enter decrees
" in accordance with this opinion, that both vessels
" were in fault, and the damages should be divided.
" Reversed."

The mandate in the case of Cotton against the two steamships is given in the Record, pages 49 to 53, concluding as follows:

" And whereas in the present term of October, in
" the year, &c., 1893, the said cause came on to be
" heard before the said Supreme Court, on the said
" transcript of record, and was argued by counsel.
" On consideration whereof it is now here ordered,
" adjudged and decreed by this Court that the decree
" of the said Circuit Court in this cause be and the
" same is hereby reversed, with costs, &c. And it
" is further ordered that this cause be and the same
" is hereby remanded to the said Circuit Court, with
" directions to enter a decree in accordance with the
" opinion of this Court. You therefore are hereby
" commanded that such execution and further pro-
" ceedings be had in said cause, and in conformity
" with the opinion and decree of this Court, as ac-
" cording to right and justice and the laws of the
" United States ought to be had, the said appeal
" notwithstanding."

In accordance with the mandate, a decree was entered by his Honor Judge Lacombe, June 4, 1894, Sanbern, the owner of the cargo, having been substituted as libellant in place of Cotton, adjudging the *Britannia* and the *Beaconsfield* both in fault and that the libellant recover his damages, amounting to $42,748.63, with interest. And further, that the steamship *Britannia* and the steamship *Beaconsfield* be each condemned in a moiety of said sum (Final Decree, Record, pp. 61, 62).

The owner of the *Beaconsfield* and his surety have taken an appeal to this Court from this final decree, claiming: *First*, that the mandate of the

Supreme Court left it open to them to claim in the Circuit Court that the *Beaconsfield* was not liable to be condemned for a moiety of the damages recovered. *Second*, that the surety was discharged by a change of the party libellant. *Third*, that because no appeal was taken by Cotton, the original libellant, from the decree of the Circuit Court absolving the *Beaconsfield* from fault and liability, that that part of the decree stands unreversed, and the Court could not, under the mandate, now enter a decree against the *Beaconsfield* (Certif., fols. 28–35).

It is obvious that this appeal is absolutely without merit. The objections made are purely technical. The Supreme Court, upon a careful review of the whole case, having found both vessels in fault, the result is exactly that which the maritime law awards for placing the loss equally upon the two parties found in fault and indemnifying the owner of the cargo therefor.

The questions, however, raised and which are in substance those put by the Circuit Court of Appeals to this Court in its certificate, are discussed in the following points:

POINTS.

I.

So far as it directs the equal division of the damages between the two vessels, the decree of the Circuit Court obeyed the mandate of this Court.

Where the action of the Circuit Court, in entering the final decree, conforms to the mandate and there are no proceedings subsequent thereto not settled by the terms of the mandate itself, no second writ of error can be maintained.

Texas and Pacific Ry. Co. v. *Anderson*, 149 U. S., 237.

In *Mason* v. *Pewabic Mining Co.*, 153 U. S., 366; this Court says:

"In *Texas and Pacific Ry.* v. *Anderson*, 149 "U. S., 237, the action of the Circuit Court con- "formed to the mandate, and there were no pro- "ceedings subsequent thereto not settled by the "terms of the mandate itself, and we, therefore, "held, upon the authorities cited and for the rea- "sons given, that, on the facts appearing in the "record, the Circuit Court of Appeals could not re- "view by writ of error the judgment of the Circuit "Court."

This principle is not denied by the counsel for the appellant, but he seeks to distinguish the case on the ground that there was something left open for judicial action in respect to this question in this mandate. An examination of the opinion, however, and of the mandate, which refers to the opinion, shows that there was a distinct and positive direction by this Court for the entry of the decree in this suit awarding damages and dividing it between the two steamships.

It is argued by the counsel for the appellant that the opinion of the Court finding both vessels in fault and that the damages should be divided had special reference to the cross-libels and cross-appeals of the owners of the vessels for the hull damages sustained by the vessels in the collision.

But a reference to the mandate *in this particular case* shows that the opinion, as interpreted by this Court itself when it came to make the mandate in this particular case, was not thus restricted, because the mandate in this particular case remands the cause to the Circuit Court, with directions to enter a decree in accordance with the opinion and directs further proceedings in conformity with the opinion and decree of that Court (Record, p. 53).

The opinion, therefore, which distinctly is that the damages be divided between the two vessels, is

incorporated into and made a part of the mandate, and by no possible construction can the mandate be interpreted to mean that the libellant recover damages against one of the vessels alone.

It is not disputed by this appellee that the Circuit Court could entertain a motion after the filing of the mandate for the substitution of a new libellant upon sufficient cause, there being no change in the party represented by the libellant as so substituted, nor that the action of the Circuit Court in such new matter would be subject to review in the Court of Appeals. Nothing in the mandate prevented such an application to the Court, which is often rendered necessary at any stage of the cause by death or otherwise, and whether or not the change that is actually made in this case impaired the obligation of the surety on the undertaking is a question hereinafter considered, but that the Circuit Court had no right to entertain the question whether the damages should be divided between the two vessels is quite clear, unless that Court was at liberty to set aside the direction of this Court.

The cases cited in support of his point that there remained something to be judicially determined by the Circuit Court as respects this question in his brief filed in the Circuit Court of Appeals by the learned counsel for the appellant are *Mason* v. *Pewabic Mining Company*, 153 U. S., 361, and the *E. A. Packer*, 58 Fed. Rep., 251, and they do not sustain his contention. In the former of these cases this Court had affirmed the decree below, except in respect to the accounting, as to which the decree was reversed and a reference directed. The matter judicially determined after the filing of the mandate was itself a question arising upon such accounting. It related to the question of allowance to counsel out of the amount realized upon a sale which had been ordered, and this Court so interpret their own mandate.

The case of the *E. A. Packer*, 58 Fed. Rep., 251, was virtually a case sent back for a new trial by the

mandate and not the case of a mandate directing specifically a particular decree.

The case *U. S.* v. *Jahn*, 155 U. S., 109, does not touch this present controversy, except that it may be held to have determined that where a final decree is entered by a Circuit Court which involves a question properly determined by it upon the merits, and also a question of jurisdiction, the party defeated may prosecute his appeal to the Circuit Court of Appeals upon the whole case, bringing up both questions, and is not obliged to appeal to the Supreme Court on the question of jurisdiction, and thereby waive his right of appeal upon the merits. It only affects this case as showing that the Circuit Court of Appeals had jurisdiction upon this appellant's appeal from the final decree of the Circuit Court because of the determination of the new question passed upon by that Court as to the substitution of a new party libellant. It does not show that that Court could in the exercise of such jurisdiction reconsider a question determined by the mandate of this Court.

II.

At all events, if appellants' appeal to the Circuit Court of Appeals properly lies for the review of the proceeding substituting Sanbern as libellant, that Court could not review that part of the decree charging the Beaconsfield, because in that respect the Court simply executed the mandate of this Court.

III.

The proceedings for the substitution of Sanbern, libellant, after the decision in the Supreme Court, were entirely regular and in no way affected the liability of the claimant Cleugh or the surety Libbey.

There have been two changes in the libellant in the course of the cause. The original libel against the *Britannia* alone was filed by Cotton, master, and George Cleugh, owner, as bailees of the cargo. A decree in the District Court was entered in favor of Cotton and Cleugh as libellants, and George Cleugh having died, an order was entered on the 3d October, 1890, substituting Elizabeth Cleugh, as administratrix, as party claimant, but continuing the libel in the name of Cotton alone. This was while the case was pending on appeal in the Circuit Court, in which the final decree was entered on the 8th October, 1890.

Cotton having continued the sole libellant until after the case was decided in the Supreme Court, then Sanbern, the owner of the cargo, on whose behalf as bailee and owner the libel was originally filed, made application to be made libellant in the place of Cotton, and it was so ordered.

In considering the questions raised under this claim of the appellants, of a discharge of the surety, the material question is whether the changes made in the name and person of the libellant have in any way changed the cause of action or increased in any way the liabilities of the claimant or the surety or prejudiced any available right of the surety which is entitled to protection.

It is argued by the learned counsel for the appellant that Sanbern sues or holds the position of libellant in a different interest from that in which Cotton and Cleugh, the master and owner, sued originally;

that if Cotton had continued sole libellant he could not maintain the suit, because it appeared by the opinion of the Supreme Court that the damage was caused by his personal fault; that Cleugh, the claimant, would have had rights of set-off against Cotton, suing as bailee, which he cannot have against Sanbern, suing in his own right; and, in fact, that a suit by the master of the vessel to recover damages to the cargo caused by his own fault, and especially a suit by the owner of the vessel, who was one of the original libellants against himself, involves an absurdity and impossibility in law. These propositions all rest upon the theory that the suit as prosecuted by Cotton, or by Cotton and Cleugh, is not the same cause of action or not for the same relief with that prosecuted by the owner of the cargo. This is altogether a mistake.

The right of the carrier to sue as bailee of the cargo, whatever may be the character of the interest which justified his being made plaintiff in such a suit, is clearly a right to recover on behalf of the owner of the cargo the whole amount of damage which that owner has sustained by reason of the fault of the vessel.

In *Hardman et al.* v. *Brett*, 37 Fed. Rep., 803, a suit in admiralty was brought by the insurers of a carge of lumber lost at sea, suing in the right and as assignees of the owner of the cargo against a carrier who, as bailee, had recovered the value of the cargo from the vessel in fault, and Judge Wallace, in speaking of the character of the plaintiff in such a suit and the nature of the cause of action, says:

"In prosecuting the suit against the steamship
" the defendant did not assume to act as an agent
" for the owners of the cargo; but he claimed to re-
" cover the value of the goods lost by virtue of his
" special property in them as carrier. It is familiar
" law that the special right of property conferred by
" a bailment is sufficient to enable the bailee to re-

" cover the full value of the property of a wrong-
" doer who destroys it; and this, whether the bail-
" ment is for a consideration or is merely a naked
" bailment. Thus a traveler was allowed to recover
" in trover against a steamboat company the full
" value of a satchel entrusted to his care by a friend
" (*Moran* v. *Steam Packet Co.*, 35 Me., 55), and the
" finder of a jewel was permitted to recover its
" whole value for a conversion by a stranger, in the
" leading case of *Armory* v. *Delamorie*, 1 Strange,
" 304. Inasmuch as the law does not allow a de-
" fendant to be vexed twice for the same wrong, a
" recovery by the person having a special property,
" and satisfaction by the wrongdoer, discharges the
" latter from all liability to the owner (*White* v.
" *Webb*, 15 Conn., 305; *Smith* v. *James*, 7 Cow.,
" 328; *Harker* v. *Dement*, 9 Gill, 7.

" When the defendant received the money in
" question from the owners of the steamship he
" thereby absolved them from any further liability
" to the plaintiffs. The plaintiffs took no part in
" the suit, were not consulted, and had no oppor-
" tunity to intervene in any way. As is said in the
" opinion of the Court in *The Commander in Chief*,
" 1 Wall., 43, doubtless they might have intervened
" and petitioned the Court for the transfer of the
" money to them at any time before the distribution
" of the fund in the registry of the Court. But they
" were under no obligation to do this, and were at
" liberty then, as they had been at any time after
" their right accrued, to bring an action against the
" owners of the schooner and recover the value of
" the cargo, which had not been delivered pursuant
" to the duty of the carrier. In such an action it
" could not be maintained by the carrier with any
" color of plausibility that he should be permitted
" to retain or recoup against the demand of the
" cargo owner any sum which he might have ex-
" pended in prosecuting a suit brought for his
" own protection and indemnity against a wrong-
" doer by whose act the cargo was lost. Such a de-

" fense would be preposterous in a case where the " loss of the cargo was caused by the misconduct of " the carrier; and such was the fact in the present " case. Instead of bringing such a suit for the " value of the cargo, the plaintiffs have elected to " sue the defendant, who has received a fund " which, in legal contemplation, is the cargo itself. " If the defendant had sold the cargo and received " the proceeds, the plaintiffs could maintain an ac " tion against him for the amount, upon the prom- " ise implied by law to pay them to the true own- " ers. What the defendant has done is equivalent " to that, because he had no right to appropriate " the fund to any other object than that of paying " it to the true owners in order to exonerate him- " self."

The views here expressed as to bringing in at any time the real party in interest and the capacity in which the carrier sues for damage to cargo are fully sustained by the cases of The Propeller *Commerce*, 1 Black., 574, 582, and the *Commander in Chief*, 1 Wall., 43, 51, 52.

Thus, while the ground on which the carrier is permitted to sue is a special property, the claim that he prosecutes is for the whole value of the property lost or amount of damage which the owner of that property has suffered.

The doctrine of set-off or recoupment is purely equitable and against a claim, the prosecution of which will discharge the liability of the wrongdoer to the owner, it will be preposterous to suppose that any recoupment or set off would be allowed as against the plaintiff's claim thus prosecuted, which would defeat the right of the owner to receive the amount of damages which his bailee seeks to recover for his indemnity, and which, in equity, if recovered, belongs to him.

The case of *Simpson* v. *Thompson*, 3 Appeal Cases, 279, cited in the appellant's brief, has no application to the question in controversy. That an underwriter gets no better right by the payment of the

loss or by an abandonment to him than the owner of the property insured had, is too obvious to need comment.

If Cotton had continued to be the libellant and judgment had been entered in his name and the amount had been paid in satisfaction of the decree, clearly neither the claimant nor his surety would be permitted to go into equity for the purpose of offsetting against the money thus recovered and belonging to the owner of the cargo in equity, a claim of the owner of the ship against the master for his negligence in causing the disaster.

Nor is there any absurdity such as is claimed to have been involved in the prosecution of this suit by Cotton up to the date of the substitution of Sanbern, or such identity of plaintiff and defendant as involves any absurdity or impossibility in law, because the plaintiff Cotton was suing by virtue of his character as bailee to recover the whole amount of the claim of the owner of the cargo, and the judgment, if recovered, would inure to the benefit of that owner. He was not, therefore, suing himself nor was Cleugh, the owner of the vessel, suing himself. It was, in fact, the owner of the cargo suing the owner of the vessel. And the cases cited in the appellant's brief of the discharge of surety by the substitution of a new party are all of them cases where the change of party involved a change of the real cause of action, and the surety was properly held to be discharged.

As to the questions raised with regard to the character of the libellant up to the time of the substitution of Sanbern, it is perfectly obvious that the District and Circuit Courts proceeded, with the acquiescence of all the parties, on the theory that the owner of the cargo, under cover of the libel brought by the carrier, was pursuing his remedy against the ship, and from the time that the *Beaconsfield* was brought in that the owner of the cargo was pursuing his remedy for his damages against both ships.

The District Judge, in his opinion, speaks of it as a suit by the owner of the cargo.

If any suggestion had been made of any technical difficulty in the claim being prosecuted by the owner or the master of the *Beaconsfield* as carrier against that ship as well as the *Britannia*, the points thus raised could have been considered, and the proper parties substituted, and the owner of the cargo then brought in. But the parties before the Court prosecuted the case upon its merits. It was not even suggested in this Court that there was any difficulty about the master of the *Beaconsfield* recovering for the owner of the cargo the value of the goods lost as against the *Beaconsfield*. It is too late now after the cause has been heard and determined upon its merits, and a final judgment ordered to be entered in favor of the libellant by the mandate of this Court, upon a mere technicality, to claim that all the time the alleged cause of action as against the *Beaconsfield* was an absurdity, and that the courts were not entertaining a real question or controversy, but enacting a farce.

IV.

The fact that the libellant Cotton had not appealed from the decree of the Circuit Court interposed no obstacle to the entering of the final decree by the Circuit Court conformably to the mandate of the Supreme Court.

First.—If we have rightly construed the mandate of this Court, this question discussed by the appellant does not arise. If this Court has decided and directed a decree to be entered dividing the damages, and the meaning of that is that each vessel shall be charged with one-half of the total amount recovered,

then no further authority is needed for the proposition that the Circuit Court had jurisdiction to enter such decree.

Second.—But the objection made is untenable, because, from the nature of the case and the mode in which it was heard and determined, it is immaterial that there was no appeal taken by Cotton from the decree of the Circuit Court.

A vessel chargeable with a maritime tort is liable for the whole amount of the damages, even although the damages were the result of the contributory negligence of two vessels (*The Atlas*, 93 U. S., 302).

Therefore the owner of the cargo injured by a collision in which two vessels were both guilty of negligence can pursue his remedies against both or either at his option. He was not by the maritime law required to join both vessels. Rule 59 was intended so far to modify the remedy that it allowed a vessel sued to bring in as a defendant in the suit another vessel which it claimed was at fault for the collision, though not claimed to be so in fault by the libellant, and in such suit to try the question which of the two vessels was at fault and responsible to the libellant for his damages. The rule does not alter the law as to the liability of any vessel *in solido* for the damages which the libellant has sustained through its fault. It simply affords a means by which if another vessel is claimed to be at fault the whole or a part of the damages may be collected of such other vessel.

Hence the form of the decree against two vessels is, first, a judgment that the plaintiff is entitled to recover the full amount of his damages, and this part of the decree is equally against both vessels; and, second, a provision in the decree that each be condemned for the payment of one half. It often happens that where two vessels are liable for the effects of a collision, notwithstanding that the maritime law apportions the damages in such a case, one

of them is obliged to pay the whole loss. If by a collision one of the vessels is sunk and totally lost, this apportionment is impracticable, and the vessel that survives the collision is obliged to pay the whole loss. So even after a suit has been begun against two vessels, and both are in the custody of the Court, it is conceived that if one of the vessels shall be destroyed without any fault on the part of the libellant, the fact that both had been sued would not affect the right of the libellant to recover his whole damages against the vessel that remained.

The effect of Rule 59 is to bring both vessels in as defendants and it provides that if the process is duly served on such new vessel or party the suit shall proceed as if the vessel or party newly brought in had been originally proceeded against.

The rule requires service of the petition upon the libellant as well as upon the co-defendant, an answer by the other parties to the petition and an answer by the petitioner to the libel (Rule 59, 112 U. S., 741).

In this case the cause proceeded without any objection so far as it appears, that no issue by pleading was made between the *Beaconsfield* and the libellant, as to the *Beaconsfield's* fault. The libellant having recovered his entire damages had no occasion to appeal because the issue raised between the *Britannia* and the *Beaconsfield* was in substance how those damages should be paid if either vessel was in fault.

The *Britannia* if found to be in fault by the Supreme Court could not exonerate itself from the payment of any part of the damages except by obtaining a decree that the *Beaconsfield* should pay one-half of them. It was not a question whether the *Britannia* was liable for the whole or a half. As a ship in fault in a collision it was liable for the whole, and that rule of law is not changed by the 59th rule in Admirality. It was merely a question raised, debated and decided as to whether the *Beaconsfield* was in fault, and thereby the

Britannia could be exonerated from the payment of one-half of the damages for which it was liable. Notwithstanding the decision that the *Beaconsfield* was in fault if she, being in custody, had been destroyed before the entry of the final decree the *Britannia* must still have paid the full damages.

The claim that the libellant is estopped by the averments of the libel and by those of his answer to the petition that the *Beaconsfield* was not in fault is wholly unfounded. A party may be estopped to deny what he has alleged in his pleadings and bound by such estoppel up to the time of the judgment; but if by the judgment it is the determination of the Court that the fact is otherwise than as stated in the pleading, then the fact as found is conclusive upon that party as well as upon all other parties, and he not only is not estopped from denying what he has alleged in his pleading contrary to the decision of the Court as to the fact, but he is estopped from further claiming the fact as alleged by him, because he is concluded by the decree as to such fact.

In this case this Court having before it the pleadings which showed what the parties had severally alleged against the other, the issues made between the parties respectively by the pleadings, having heard the claims and the arguments of the advocates for the *Beaconsfield* and the *Britannia* respectively, have determined that in this case judgment shall be entered conformably to their opinion, which is that in the three cases, including this, the damages are to be divided; and now to say that the *Beaconsfield* can escape the payment of any part of the damages is to say that the damages are not to be divided.

It must be assumed now in this aspect of the case that this Court, having before it all these matters, have determined that, notwithstanding the want of an appeal and notwithstanding the averments in the pleadings to the contrary by the libellant on the final determination as to the facts, the *Beaconsfield* should

pay one-half of the damages to which the libellant was found to be entitled.

The issue was plainly made as to fault and as to liability by the petition of the *Britannia* and the answer of the *Beaconsfield*. It was not the intention of Rule 59 to compel a libellant to allege a fault against his vessel which he did not believe to be in fault, or in the alternative to lose half his just claim. Whatever might be the belief or the averment of the libellant, it permitted this issue to be raised between the vessel sued and another vessel as to fault and liability, and thus permitted the vessel sued to aver against the other vessel, fault and liability and thus exonerate herself from satisfying half the judgment recovered. This issue made is sufficient to sustain the final decree.

In the case of the *Galileo*, which was a suit brought by the owner of cargo against two vessels, the *Galileo* and the *Baxter*, in which the District Court decreed that the *Galileo* was alone in fault, and in which the *Galileo* appealed to the Circuit Court, and the libellants, although appealing, abandoned their appeal before the case was heard in the Circuit, the Court say (29 Fed. Rep., 540):

"In the present case the libellants could have pro-
"ceeded against either vessel and recovered their
"whole damages, notwithstanding it might have
"appeared that the collision was produced by the
"contributing negligence of both (*The Atlas*, 93
"U. S., 303). It was to obviate the hardship of com-
"pelling one vessel to pay the whole damages for a
"collision in which another vessel, not sued, was
"equally guilty with the vessel sued, that led to the
"adoption of Supreme Court Rule 59 (112 U. S., 743),
"by which the claimants of the vessel sued can
"require another vessel which contributed to the
"same collision to be proceeded against in the same
"suit. The object of this rule is to prevent a
"libellant from pursuing one vessel alone when
"two are equally responsible for the damages
"caused by a collision, and to require both, at the

" option of either, to be brought in, that a decree " for a moiety of the damages may be made against " each when such a decree will fully protect the " libellant.

" The party most interested in supporting the " decree of the District Court was the *Baxter*. Her " owners were entitled to be heard in support of it " on the appeal, and they were heard. If their " present contention is correct, either the *Galileo* " has appealed in vain, because, although she " ought to be held responsible primarily only for a " moiety of the damages, she must now be held for " the whole, or the libellants, who had no reason to " be dissatisfied with the decree of the District " Court, inasmuch as they were awarded their " whole damages against the *Galileo*, must lose a " moiety of the damages, because they did not ap- " peal and further litigate the cause for the benefit " of the *Galileo*. The statement of such a propo- " sition is its answer."

It is clear, therefore, from the rule as well as the cases decided under the rule, that the substantial question, where another vessel is brought in and charged with fault in the collision, is between the two vessels proceeded against, and that the libellant having recovered his whole damages, is not required by the rule to litigate further for the benefit of the vessel first sued.

While the rule seems to contemplate an answer by the libellant to the petition, yet the question of fault or no fault as to both of the vessels is plainly raised by the issue made between the two vessels—the co-defendants—and each of them has an interest in the damages found for the libellant, being charged one-half upon the other vessel.

Nor is it true, as assumed by appellant's counsel, that the part of the first decree of the Circuit Court absolving the *Beaconsfield* stands unreversed and not appealed from. The appeal of the *Britannia* clearly

covers the whole decree, including this part of it (Record, p. 48).

In the present case the parties proceeded in Court upon the theory that the real issue was between the two vessels and between them alone. No objection was taken in this Court, either by the *Britannia* or the *Beaconsfield* that the libellant had not appealed or that no issue directly was made by pleading between the libellant and the *Beaconsfield* as to her fault. The briefs filed in the case in this Court on the part of the *Beaconsfield* show clearly that the main question debated was the question of the fault of the *Beaconsfield*. The *Britannia*, it is true, contested the finding of any fault of navigation on its part, but an examination of the opinion of this Court will show that that question was easily disposed of, and almost the whole of the opinion of the Supreme Court, both the opinion of the Court and the opinion of the dissenting Justices is taken up with the question of the fault or alleged fault of the *Beaconsfield*. And yet the question of the fault of the *Beaconsfield* was utterly immaterial to the *Beaconsfield* in this suit if, as now claimed on the part of the *Beaconsfield*, the libellant, not having appealed or not having averred fault against her, could not ultimately recover any part of his damages against the *Beaconsfield*.

The *Beaconsfield*, therefore, has led the Court to believe that the question of its fault was material to the ultimate decision of the case. After the opinion of this Court was filed a motion for reargument was made, and the briefs filed show that the *Beaconsfield* did not then take the ground that the opinion of the Court that the damages be divided, which plainly applies to this case, was erroneous. Nor upon such reargument did they ask the Court to send down their mandate in this case without directing any decree against the *Beaconsfield*.

While it may be assumed that the Court cannot enter a decree without pleadings, yet the issue made

upon the pleadings between the *Beaconsfield* and the *Britannia* was quite sufficient to sustain the decree finally rendered, because the *Britannia* had itself an interest in compelling the *Beaconsfield* to pay one-half of these damages. The libellant could not, by failing to appeal, disturb that equity in the bearing of the loss which is the rule of the Admiralty in such case. Not only the libellant, but the *Britannia*, was interested in having the decree entered against the *Beaconsfield*, otherwise the *Britannia* might well complain that it sustained more than one-half of the damages finally recovered. Indeed, both vessels having given stipulations for value, the libellant had no interest in the question which of them paid the damages or in what proportion they should pay them.

The circumstances of this case are peculiar in that the *Beaconsfield* was itself, through its master and owner, claiming on behalf of its bailor to recover the damages to its cargo.

If an appeal by Cotton, the libellant, was proper practice it was the fault of the master and owner of the *Beaconsfield* that no appeal was taken.

Such a triangular case in which the carrier is himself libellant may be regarded as essentially a case where the carrier sues the other vessel, claiming, first, for the damage to his vessel, and, secondly, for the damage to the cargo, of which he is the bailee.

Though there was no order of consolidation the cases were tried as one, and this was the attitude of the parties. Courts of Admiralty are courts of equity; at least they administer the laws upon equitable principles.

Watts *v.* Connors, 115 U. S., 361.
Brown *v.* Tule, 2 Sumn., 443.
Copp *v.* Sugar Co., 8 Ben., 321.
The *Betsey v. Rhoda*, 2 Ware, 117, 124.
The Brig *Sarah Ann*, 2 Sumn., 212.
Kellum *vs.* Emerson, 2 Curtis C. C., 82.

They do not tolerate fraud or double dealing or deceit, and if the owner of the *Beaconsfield* has thus through its master and servant suing for the benefit of the owner of the cargo, led the Court to believe and act upon the belief up to the final decision of this Court, that the question of its own fault was a vital question to himself in the case (and it could only be of importance to him for the purpose of securing to the libellant half or the whole of the damages in case his vessel was found to be at fault), then it would seem that the Court could enter a decree conformably to the theory upon which the case had been prosecuted in the event of the *Beaconsfield* being thus found in fault. At least, that decree having been ordered by the Court in its mandate and duly entered in conformity therewith, it would be inequitable and unjust to relieve the *Beaconsfield* from the liability which is justly imputable to it, and which it has clearly, in the case found by this Court as to the facts, invited against itself.

It is no answer to this to say that proof of the fault of the *Beaconsfield* was necessarily considered for the purpose of determining the liability of the *Britannia*. This is a reason why the *Britannia* should insist that the *Beaconsfield* was in fault, but no reason why the *Beaconsfield* should insist in this case that it was not in fault. Good faith required that the owner of the *Beaconsfield* should have been frank with the Court, and insisted that in this case he had no interest in *disproving the fault of the Beaconsfield* since he could not be held liable even if in fault.

To relieve the *Beaconsfield* now in this situation would be to allow it to disown and repudiate the theory on which the case was tried and determined in this Court. It would allow the claimants of a vessel suing as bailees of a cargo to take advantage of their own fault in pleading as against the owners of the cargo, whose rights they undertook to protect, in order to escape a liability which they led the Court to believe they were litigating with the owner of the